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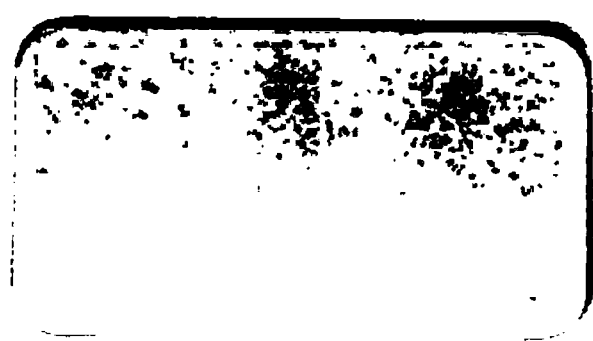
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DUTIES
OF
SHERIFFS AND CONSTABLES,

AS DEFINED BY THE LAWS,
AND INTERPRETED BY THE SUPREME COURT,
OF THE STATE OF CALIFORNIA.

WITH
Practical Forms for Official use, and the Fee Bills of
each of the Counties of the State.

BY
W. S. HARLOW.

SAN FRANCISCO:
SUMNER WHITNEY & CO.

1884.

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PREFACE.

In the preparation of this volume the author has aimed to furnish, as a guide to Sheriffs and Constables, the laws of the State of California relating to their official duties, with such interpretations of those laws as have been made by the Supreme Court of California, together with such observations and suggestions concerning the duties of officers as the writer has stored up in an experience of nearly ten years of uninterrupted service in the Sheriff's Office in this State.

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CHAPTER I.

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- § 21. Erasures in Return.

§ 1. **Prompt Service Due to Plaintiff.**—The service of the summons—and, in fact, of any process—should not be unnecessarily delayed. The plaintiff is in pursuit of his rights, and he may reasonably expect prompt assistance in that pursuit, from the officers upon whom he must rely. Delay in the service of

even so simple a process may subject him to irreparable loss. He is entitled by right to every facility which the law allows him to a speedy hearing of his cause before the court.

§ 2. **The Receipt.**—The original summons should be endorsed as soon as received, with the month, day, year, hour and minute of its reception; copies for service prepared, and compared with the original, to ensure correctness, and a copy of the complaint attached to one of the copies of summons.

§ 3. **The Complaint.**—A copy of the complaint for service will be furnished to the officer with the original summons. If the case is brought in a Justice's Court, the complaint may be either a concise statement, in writing, of the facts constituting the plaintiff's cause of action, or a copy of the account, note, bill, bond, or instrument upon which the action is based. (§ 853 C. C. P.)

§ 4. **County Clerk's Certificate.**—When a summons, issued by a Justice of the Peace, is to be served out of the county in which it was issued, the summons must have attached to it a certificate under seal by the county clerk of such county, to the effect that the person issuing the same was an acting Justice of the Peace at the date of the summons. The copy of summons served by the officer should have attached to it a copy of such certificate. (§ 849 C. C. P.)

§ 5. **By Whom may be Served.**—Section 410 of the Code Civil Procedure provides that the summons may be served by the sheriff of the county where the defendant is found, or by any other person, over the

age of eighteen, not a party to the action. When it is served by any person other than the sheriff, the return must be by an affidavit of such person of its service, and the return must state that at the time of the service, the person serving it was over the age of eighteen, and not a party to the action. (See Sheriffs' and Constables' Forms, Chap. XXIII.)

§ 6. **How Served on Minors.**—Sub-division 3 of section 411, Code Civil Procedure, provides for the service of summons on minors under the age of fourteen years. Not only should a copy of the summons be delivered to each minor, but a copy for each minor should be delivered to the father, mother, or guardian, or the person having the care or control of such minors, or with whom they reside, or in whose service they are employed.

If a father sues his infant son residing with him, and the statute requires the summons to be served personally on the infant and also on the father, a service on the infant alone is sufficient, for the father has notice of the suit without service. (*Brown v. Lawson*, 51 Cal. 615.)

The return of service should be sufficiently explicit to show that not only a copy of the summons had been delivered to each minor, but that in addition thereto a copy was delivered to the father, or mother, or guardian, etc., for each minor. There are no means of avoiding the provision of the Code which requires service of summons upon infant defendants. The Court acquires jurisdiction of the persons of infant defendants, so as to authorize the appointment of a *guardian ad litem* for them, only by service of summons upon the infants.

§ 7. **Service on Corporations, Etc.** The manner of service upon corporations, insane persons, counties, cities and towns, is provided for in section 411 Code of Civil Procedure. Service on a corporation formed under the laws of this State, is made upon the president, or other head of the corporation, secretary, cashier, or managing agent thereof; on a foreign corporation, upon its agent, cashier or secretary; upon an insane person, by service on said person and also on his guardian; on a county, city or town, to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof.

In an action against a corporation, where the summons was served upon Bristol, who had been duly elected its president, and presided at several meetings of its board of trustees, and who had never resigned, or been removed, or his office declared vacant, or a permanent president chosen in his place—though he had left the county and no longer took any part in the management of the corporation affairs, and at the meeting of the Board after his so leaving the county, another person was elected President *pro tem.*, for that meeting, and was regarded by the stockholders as the President: *held*, that Bristol was still President *de jure*, and the service upon the corporation valid. (Eel River N. Co. *v.* Struver, 41 Cal, 618.)

In Aiken *v.* Mariposa Mining Co., 6 Cal. 186, an action against a corporation by its corporate name, the Sheriff's return showed that the summons was served on "defendant Waddell, who was in possession of the property;" the name of Waddell was not mentioned in the complaint, and it did not appear how he became a defendant, or of what property he was in possession.

The court held that as Waddell was not shown to be one of the officers named, judgment by default was improperly entered, and it was reversed with costs.

In *Rowe v. Table Mountain W. Co.*, 10 Cal. 444, a question was raised as to the regularity of a judgment by default, on a service of the summons upon one M. as president, and C. as secretary, without proof beyond the mere return that those persons were such officers. The court held that as the statute expressly authorized a service upon the corporation by serving the summons on their officers, and as the practice had been to take judgment by default upon similar returns, they would not hold it erroneous.

§ 8. In actions against Vessels.—In an action against a steamer, vessel, or boat, the summons and copy of the complaint must be served on the owners if they can be found; otherwise, they may be served on the master, mate, or person having charge of the steamer, vessel, or boat. (§. 816, C. C. P.)

§ 9. Avoiding Service.—Serious annoyances sometimes occur from incomplete services of summons, and from imperfect returns of service. Defendants often attempt to avoid service, and when found and the summons is tendered to them, refuse to take it.

It is a sufficient service in such a case to lay the summons upon the defendant's arm or shoulder, or reach it toward him and let go of it, leaving it to the defendant to take or let it alone. A court will hold that it does not lie in the mouth of a person to say he was not served with process when it is offered to him and he refuses to take it.

§ 10. **True Name of Defendant.**—The return of the officer should show the true name of the defendant served; and, to ascertain the true name, he should ask the party served if the name designated in the summons is his true name. If the name in the summons is Alfred Brown, and the true name of the defendant is Albert Browne, he should return that he served the summons on Alfred Brown, the within named defendant, whose true name is Albert Browne.

The copy of summons must be delivered to the defendant personally. It is no service on a defendant to deliver it to any relative of the defendant for him.

The law is explicit in this regard, and wisely so; for, if it were otherwise, advantage might be taken in many ways by evil-disposed persons to defraud defendants of their rights. A court acquires no jurisdiction over a defendant who has not been legally brought into court.

By reference to § 410 Code of Civil Procedure, it will be observed that, in the service of the summons, "a copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants." The officer's return, to be absolutely complete, should state that the defendant upon whom the copy of complaint was served was at the time of such service a resident of the county in which the service was made.

§ 11. **Insufficient Evidence of Service.**—In *O'Brien v. Shaws Flat & T. C. Co.*, 10 Cal., 343, where the return of the sheriff showed that he served the summons "upon James Street, one of the proprietors of the company," the court held it was not

sufficient evidence of service to give the court jurisdiction, and that the summons might, with as much propriety, have been served upon any other stranger.

A summons from a justice's court was addressed to defendants Adams & Co. The constable returned that he had served it "by leaving a copy thereof with Captain Charles B. Macy," with the date. Judgment by default thereon was held bad. The court said the justice could, with as much propriety, have entered judgment on a certificate of service upon any other person. (Adams *v.* Towne, 3 Cal., 247.) The sheriff's return that the summons was served on one of the members is *prima facie* evidence of that fact. (Wilson *v.* Spring Hill, etc., Co., 10 Cal., 445.)

§ 12. **Informal Service.**—Where the return on a summons states that a copy of the summons was personally served on the defendant in the action, giving the time and place, this return, it is held in Drake *v.* Duvenick, 45 Cal. 455, that although informal, is sufficient to give the court jurisdiction of the person, so that the judgment is not void for want of jurisdiction, when collaterally attacked. Also, held, that while such return does not show that a copy of the complaint was not delivered to the defendant personally, it has at least some legal tendency to prove that it was so delivered. Also, that if, in such a case, there is more than one defendant, the fact that the return does not state that a copy of the complaint was served with the summons, does not render the judgment void in a collateral attack.

§ 13. **Return Prima Facie Evidence of Fact.**
—The following return was held to be good in the

case of *Cardivell v. Sabichi*, 59 Cal. 490. "I hereby certify that I have served the within summons by delivering a copy thereof, together with true copy of complaint, personally, at the Township and County of Los Angeles, this 25th day of April, 1879. W. Bettis, constable." etc. It will be observed that this return fails to state upon whom summons was served, but as there was but one defendant, the court could determine that the service was made upon him. Nor does it state that the copy of complaint delivered was a copy of the complaint in the action mentioned in the summons. It also fails to state that the service was personal, but only that the officer acted in person. The return was held to be sufficient proof of service; as, whatever may be the difference between superior and inferior courts, with reference to presumptions indulged in their favor, there is none between sheriffs and constables; (Political Code, § 4315,) and the return of a sheriff is *prima facie* evidence of the facts stated; (Political Code, § 4178.) and by force of section 4315 the same effect is given to a constable's return.

§ 14. **Sufficient Proof of Service.**—Where a general power of serving process is given to an officer, a general return is sufficient. (*McMillan v. Reynolds*, 11 Cal. 379.) The following cases are also cited in point to prove the sufficiency of such a return: (*Cantley v. Moody*, 7 Port. (Ala.) 443; *Lenoir v. Broadhead*, 50 Ala. 58; *Holsinger v. Dunham*, 11 Ind. 346; *Chandler v. Miller*, 11 id. 382; *Keithley v. Borum*, 3 Miss. 683; *Crane v. Brannan*, 3 Cal. 195, 196.) In its opinion in the case of *Cardivell v. Sabichi*, the court cited sections 849, 411 and 415 of the Code of Civil Procedure, and

sections 4315 and 4176 of the Political Code, and further said: In *Legg v. Stillman et al.*, 2 Cowan, 418, which was *certiorari* to a Justice's Court, the suit was by summons in the court below, and the return on the summons was as follows: "Personally served May 14, 1822. Fees, \$0.13. Thomas McKnight, Const."

The return was held sufficient. In the case cited, the objection to the judgment was made in a collateral action, as in the case before us for decision. The judgment was adjudged valid. Our views in this case are in accord with the ruling in *Legg v. Stillman*, which ruling meets our approval. In the case cited, the time and manner of service were shown, and in this case, the time, manner, and place of service appear. In neither case is defendant mentioned, either by name or by being designated as defendant. As to the point, that the return does not show that the copy of the complaint served was the copy of the complaint in the action of *Perry, et al v. Wolfskill*, we have to say, that we do not think it tenable. The return afforded some evidence that it was such copy, and we can not say that the proof in this regard was not sufficient to authorize the Justice to render a judgment by default. (See Code Civ. Proc. § 871; *Drake v. Duvenick*, 45 Cal. 455.)

§ 15. **Return of Deputy not made in name of Sheriff.**—The return of a deputy sheriff, on a process served, is a nullity, unless made in the name of the sheriff. (*Rowley v. Howard*, 23 Cal. 402.) A summons was served by a deputy sheriff, and returned with the following signature to the return: "Elijah T. Cole, D. S." It was held that this return was insufficient to give the court jurisdiction, or authorize him to enter a default judgment.

§ 16. **Return when not Served by Officer.**—An affidavit of service of summons by a person other than the sheriff should state that such person was over the age of eighteen at the time of such service, and not a party to the action.

§ 17. **Sheriff's Return not Traversable.**—The return of the sheriff upon process or notices is *prima facie* evidence of the facts in such return stated, (§ 4178, Pol. Code) and, held in *Egery v. Buchanan*, 5 Cal. 56, that a sheriff's return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion. While the courts may sometimes, under certain circumstances, overlook irregularities in officers' returns, they will not do so in all cases. The language of the law relating to the service of process should be closely studied, its directions strictly followed, and the return should be made in strict accordance with the acts performed, as expressed in the statutory directions laid down for the officer's observance. Yet, while it is advisable in all cases to literally comply with the provisions of the code, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it. "Its provisions and all proceedings under it are to be liberally construed with a view to effect its object and to promote justice." (C. C. P. 4.) For example: The code provides that the name of the plaintiff's attorney must be indorsed on the summons. (C. C. P. 407.) In the case of *Shinn v. Cummins*, where the name of plaintiff's attorney appeared on the face and not on the back of the summons, it was held that defendant was not prejudiced by plaintiff's failure to literally comply with the statute.

§ 18. **Inexcusable Delay in Service.**—If a summons is not served until three years after the complaint is filed and it is issued, and there is no reasonable excuse for the delay, the service will be set aside, on motion, and the suit dismissed. (*Eldridge v. Kay*, 45 Cal. 49.) In this case, the defendants during all the time were living within a short distance of the plaintiff, and were easy to be found. The court held that such delay was absolutely without excuse, and that it would be a practical defeat of the statute, which limits the issuance of a summons to the period of one year after the filing of the complaint.

Where a complaint was filed and summons issued more than eight years before service, a motion to set aside the summons and strike the complaint from the files, was properly granted. (*Dupuy v. Shear*, 29 Cal. 238.)

Allowing an action to rest without service of summons, for two years and eight months after the summons is issued, is such a want of diligence as to justify the court in dismissing the action. (*Grigsby v. Napa Co.*, 36 Cal. 585.)

In making service of a summons, and in the return of such service, the provisions of the statute must be, and must be shown to have been, substantially observed and followed by the officer, otherwise the proceedings cannot be supported upon a direct appeal taken. (*The People v. Bernal*, 43 Cal. 385.)

§ 19. **When Summons Should be Returned.**—The summons should be returned as soon as served. It may not be necessary for any purpose that it should be returned on the same day, but the clerk's office is the proper place for all process, and where all parties

interested in legal proceedings have reason to expect to find their papers on file. If the officer is instructed to serve only a portion of the defendants, and there are others to serve elsewhere, the summons should be delivered to the plaintiff or his attorney, to enable him to secure service on the others.

§ 20. **Re-delivery after Filing.**—After the summons has been filed on return with the clerk, its re-delivery without an order of court would be an irregularity, of which the party opposed thereto might avail himself by direct attack on the trial of the action; though such irregularity would not render the service of the summons void. (*Hancock v. Pruess*, 40 Cal. 572.) After a summons has been served on some of the defendants, and returned, it is competent to the court to order it delivered to the plaintiff for further service on other defendants in the same or another county. (*Hancock v. Pruess*, 40 Cal. 572.)

§ 21. **Erasures in Return.**—Where the judgment of the court recites that the summons was served on the defendant, the fact that, years afterwards, there appears some erasure or interlineation on the sheriff's return, is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud, or forgery, or alteration. (*Gregory v. Ford*, 14 Cal. 138.)

CHAPTER II.

ARREST AND BAIL.

- § 22. Imprisonment for Debt.
- § 23. Arrest for Fraud.
- § 24. The Order of Arrest.
- § 25. Temporary Exemption from Arrest.
- § 26. Void Order of Arrest.
- § 27. Service of Order of Arrest.
- § 28. Sheriff's Expenses.
- § 29. When Defendant may be discharged.
- § 30. Surrender of Defendant.
- § 31. Liability of Sheriff and Sureties.
- § 32. Exception to Sureties.
- § 33. Justification of Sureties.
- § 34. Deposit of Bail Money.
- § 35. Sheriff Liable for Escape.
- § 36. Discharge Final.

§ 22. **Imprisonment for Debt.**—No person can be imprisoned for debt in any civil action, on mesne, or final process, except in cases of fraud.

§ 23. **Arrest for Fraud.**—But, under the code, (See Arrest and Bail, C. C. P.) the defendant in a civil action, after suit has been commenced, may be arrested in the following cases: 1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State with

intent to defraud his creditors; 2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment, or for a willful violation of duty; 3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff; 4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought; 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

§ 24. **The Order of Arrest.**—To entitle the party to the remedy of arrest, it is not necessary that he should know the commission of a fraud. It is sufficient, if the circumstances detailed would induce a reasonable belief that a fraud was intended, (*Southworth v. Resing*, 3 Cal. 377.) The order for the arrest must be obtained from the judge of the court in which the action is brought (§ 480, C. C. P.), and is made upon the affidavit of the plaintiff or some other person; and must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum. (§ 483, C. C. P.)

§ 25. **Temporary Exemptions from Arrest.**—The constitution of this State provides that electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom: and that members of the legislature shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest, and shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session. No person belonging to the military forces is subject to arrest on civil process while going to, remaining at, or returning from, any place at which he may be required to attend for military duty. Section 2067 of the Code of Civil Procedure provides that every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

§ 26. **Void Order of Arrest.**—Where the complaint was not filed until two days after an order of arrest had issued thereon, it was held, in *ex-parte* Cohen, 6 Cal. 318, that the order of arrest was void. A fraud merely constructive, not involving moral guilt, is not ground of arrest. A partner is not liable to arrest on the ground of fraud committed by his co-partners in contracting the partnership debt on which the action is brought, in the absence of proof that he knew

of such fraud, or that he in some way ratified the transaction. But an officer is not presumed to know the nature of the evidence relied upon by the plaintiff to prove his case; it is sufficient for him to know that the process is regular on its face, to warrant him in serving it. Whatever may be the defect in the affidavit upon which the order of arrest is issued, the order itself, if regular on its face, will protect the officer in executing it. It was so held in *Dusy v. Helm*, 59 Cal. 189, and section 4187 of the Political Code was cited by the court as statutory authority for the decision.

§ 27. **Service of Order of Arrest.**—Upon receipt of the order of arrest, with a copy of the affidavit, upon which it is made, the sheriff must arrest the defendant and keep him in custody until discharged by law. On making the arrest, the officer must deliver to the defendant a copy of the affidavit, and also, if he desire it, a copy of the order of arrest. (§ 484, C. C. P.)

§ 28. **Sheriff's Expenses.**—Section 1612 of the Penal Code provides that whenever a person is committed upon process in a civil action or proceeding, except when the people of this State are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing, and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs, or order of court.

If a judgment is rendered against a defendant in a civil action, convicting him of fraud, and he is imprisoned on an execution issued thereon, the failure of the plaintiff to make a weekly advance to the jailor, of money sufficient for the support of the prisoner, does not, *per se*, operate a discharge of the defendant. If the prisoner is adequately supported by the jailor, and the latter is willing to trust the creditor for reimbursement, the purpose of the statute is satisfied. (*Ex parte Lamson*, 50 Cal. 306.)

Section eleven hundred and fifty-four of the Code of Civil Procedure provides that whenever a person is committed to jail on an *execution* issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailor, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailor must forthwith discharge such prisoner from custody; and such discharge has the same effect as if made by order of the creditor.

§ 29. **When Defendant may be Discharged.**—The sheriff may discharge the defendant at any time upon written instructions to that effect, signed by the plaintiff. And, the defendant, at any time before execution, must be discharged from the arrest, either upon giving bail, as required in section 487 of the Code of Civil Procedure, or upon depositing the amount mentioned in the order of arrest. A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case. (*Soule v. Hayward*, 1 Cal. 345.)

§ 30. **Surrender of Defendant.**—At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested. (§ 488, C. C. P.) For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. (§ 489, C. C. P.) A certified copy of the undertaking may be obtained from the clerk of the court in which the action is brought.

§ 31. **Liability of Sheriff and Sureties.**—Where a defendant has been allowed to go at large on bail, and an attempt is made to surrender him, either by himself or by his sureties, the officer should take heed lest he make himself liable to the plaintiff by receiving the defendant into custody and thereby exonerate the sureties. In the case of *Allen v. Breslauer et al.*, 8 Cal. 552, in an action on a bail bond executed by the defendants as sureties for one Pinover, the plaintiff obtained judgment against Pinover. There was no surrender of defendant, nor any execution issued within ten days after judgment. After the expiration of ten days, an execution was issued against the body of Pinover, and placed in the hands of the sheriff. On the same day Pinover called on the sheriff, and offered to surrender himself in discharge of his sureties. But the sheriff, acting under plaintiff's instructions, refused to take him into custody. Afterwards, defendants went with Pinover to the sheriff, for the purpose of giving him in custody, when he refused to receive him. The court below entered judgment

for plaintiff, but, on appeal, the judgment was reversed.

The appellants urged that "the plaintiff should have proved that execution was issued and returned *non est*, the only obligation of the sureties being that the defendant should at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued, to enforce the judgment therein." In the case of *Matoon v. Eder*, the court discussed very thoroughly the apparent contradictions and hardships of the statute, but as that case was decided upon other grounds, came to no settled determination on this point. If the views suggested in that case prevail, we suggest that the presence of the defendant, open and notorious, at the place where process should issue, ought to be deemed a surrender under the eighty-second section. What other surrender could be made? The sheriff would not be authorized to receive him, having no process in his hands. If, however, we are wrong in the last points, we submit that the proof on the part of the defense made out a complete defense. The plaintiff, after the expiration of ten days, did issue an execution against the body of the defendant, whereupon the defendant surrendered himself to the sheriff, but the sheriff refused to receive him. If the plaintiff elected to look to the bail-bond after the ten days had expired, he should not have issued an execution. The issuing of an execution was an election to still pursue the defendant, and the surrender of the defendant to the sheriff was a compliance with the conditions of the bail-bond, the plaintiff having, by suing out the execution, waived the technical forfeiture. To permit the plaintiff to sue out the execution, which, in terms, commanded the sheriff to take

the body of the defendant, and then, by verbal direction, to command him not to obey the writ, would be sanctioning a proceeding which the court would not willingly endure. Now, suppose the sheriff had taken the defendant in execution, would not the undertaking have been satisfied, and the sureties discharged? If so, then why should not the surrender of the defendant have the same effect?

It was urged by the respondent that "no surrender having been made of the defendant, Pinover, either by himself or by his bail, in their exoneration, they, the defendants in this action, became finally charged, under sections eighty-two and eighty-three of the Practice Act, to pay the amount of the judgment. This action was brought, and the judgment herein recovered, under the law contained in the two foregoing sections, and the construction given thereto by the court, in the case of *Matoon et al v. Eder et al.* It is true that an execution was issued, but better judgment gave direction that no action should be taken thereunder. It was unadvisably issued, but judiciously arrested, before any action had been taken under it. (See *Cains v. Smith*, 8 Johnson, 337.) There was no obligation on the part of the plaintiff to arrest a *quasi* criminal on final process in that action, particularly as the practical effect of doing so would have been to release the bail and to furnish the defendant Pinover with an asylum in a debtor's prison at the plaintiff's expense, until he would have been discharged under the provisions of the statute of A. D. 1850. Had the sheriff, without the consent of the plaintiff, accepted the offers of the defendant and the sureties to surrender Pinover, after the bail had been finally charged, he would have thereby rendered himself liable to the plaintiff for the

amount of the judgment and costs. This is not a hard case on the appellants. The act to bail Pinover at a time when they considered him innocent, was voluntary on their part; and they should have been admonished, by his convictions of fraud, of his unworthiness of the succor which they had extended to him, and should then have surrendered him in their exoneration."

The opinion of the court is as follows: "The question presented is, whether, under this state of facts, defendants are liable. We think not. The legislature, when providing for the surrender of defendant within ten days after judgment, evidently contemplated that the plaintiff should take such measures as would authorize the officer to hold defendant in custody. 'The law requires no man to do a vain thing,' is a familiar maxim, and certainly it would be in vain to require a party to surrender to an officer having no power to detain him. The construction contended for by plaintiff, would enable a defendant to release his sureties by a surrender before execution, and then at once be released on *habeas corpus*, on the ground that he was illegally in custody. Such a result was never intended by the legislature, and we are of opinion that a surrender within ten days after execution is a sufficient compliance with the will of the legislature."

§ 32. **Exception to Sureties.**—Within the time limited for that purpose, the sheriff must file the order of arrest with the clerk, with his return, together with a copy of the undertaking. The original undertaking he must retain, until the sureties justify, if they are required to do so. The plaintiff, within ten days

thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court. (§ 492, C. C. P.)

§ 33. **Justification of Sureties.**—Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court, or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking. (§ 493, C. C. P.) If the bail is found to be sufficient, the sheriff is thereupon exonerated from liability.

§ 34. **Deposit of Bail Money.**—In case the amount of bail be reduced, the defendant may deposit such amount instead of giving bail. When money is deposited, the sheriff must give the defendant a certificate of the deposit made, discharge the defendant from custody, immediately pay the deposit into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. (See Arrest and Bail, C. C. P.)

§ 35. **Sheriff Liable for Escape.**—If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself

from such liability by the giving bail at any time before judgment. (§ 501, C. C. P.)

§ 36. **Discharge Final.**—Where a party is once arrested and discharged, he cannot be arrested again in the same action. (*McGilvery v. Moorhead*, 2 Cal. 609.)

CHAPTER III.

CLAIM AND DELIVERY.

- § 37. Affidavit and Order to Sheriff.
- § 38. Taking the Property.
- § 39. Who cannot Maintain Replevin.
- § 40. What is not a Particular Description of Property.
- § 41. Care of Property in Replevin.
- § 42. Justification and Retaking Property.
- § 43. Officer Responsible until Sureties Justify.
- § 44. Notice of Justification.
- § 45. How Property Taken when Concealed.
- § 46. Claim by Third Person.
- § 47. Sheriff Liable for Taking Property of Stranger.
- § 48. Indemnity Bonds.
- § 49. Correction of Valuation of Property.
- § 50. Property Lost through Act of God.
- § 51. Attachment Lien in Replevin.

§ 37. **Affidavit and Order to Sheriff.**—The duties of sheriffs and constables in taking, keeping, and delivering property in replevin are laid down in chapter two, title seven, part two, of the Code of Civil Procedure. The papers requisite to authorize the officer are: An affidavit made by the plaintiff or some one in his behalf showing that the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof; that the property is wrongfully detained by the defendant; the alleged cause of detention thereof, according to his best

knowledge, information, and belief; that it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; the actual value of the property. (§ 510, C. C. P.) The affidavit must have an indorsement thereon, in writing, by the plaintiff or his attorney, requiring the officer to take the property from the defendant. (§ 511, C. C. P.) Besides the affidavit and notice referred to, there must be furnished to the officer a written undertaking executed by two or more sufficient sureties to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff.

§ 38. **Taking the Property.**—Upon receipt of the affidavit and notice and undertaking, the officer must indorse upon them the exact time of receipt, and sign his approval of the undertaking, and prepare a copy of each for service. No unnecessary time should then be lost in taking the property. If no property can be found, the officer runs no risk; while, on the other hand, if the property be taken, it need not be delivered to the plaintiff until the sureties on the undertaking shall have justified.

The sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody, (§ 512, C. C. P.)

If the property is in the possession of any person

other than the defendant or his agent, the officer will not be justified in taking it.

He must, without delay, serve upon the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him, personally, if he can be found, or to his agent from whose possession the property is taken, or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant. (§ 512, C. C. P.)

§ 39. **Who cannot Maintain Replevin.**—One partner cannot sustain an action against his co-partner for the delivery of personal property belonging to the partnership. (*Buckley v. Carlisle*, 2 Cal. 420.) Nor can the true owner maintain replevin for crops raised on his land by others who are holding the possession of the land adversely to him. (*Pennybecker v. McDougal*, 46 Cal. 662.)

Replevin only lies for the recovery of specific personal property. Property which has not been set apart from the mass in which it is included is not specific property, and cannot be reached by an action of replevin. Just what will constitute a segregation must depend upon circumstances.

A safe in the possession of Mc C. belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum, four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC. seized eighteen hundred dollars of the money in the safe as his property, and put it in a

bag. Plaintiff then claimed the money as his, McC. being present and not objecting: *Held*, that this amounted to a segregation of the eighteen hundred dollars from the mass of coin in the safe, so as to sustain replevin by plaintiff. (Griffith *v.* Bogardus, 14 Cal. 410.)

§ 40. **What is not a Particular Description of Property.**—In replevin, where the judgment for the plaintiff describes the property to be restored as “buckwheat, valued at three hundred and sixty-five dollars and seventy-five cents,” the description is insufficient to sustain the judgment, unless the judgment refer for a fuller description to the complaint, and there is a more definite description in the complaint. (Welch *v.* Smith, 45 Cal. 230.)

§ 41. **Care of Property in Replevin.**—The possession obtained by plaintiff in replevin is only temporary. It does not divest the title, or discharge the lien. (Hunt *v.* Robinson, 11 Cal. 262.) When the property is taken by the officer he must exercise the same care in keeping it as in holding property under attachment, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same. (§ 518, C. C. P.)

§ 42. **Justification and Re-taking Property.**—After the sheriff has taken property, the defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to

them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest, (see chapter one, title seven, C. C. P.); and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant excepts to the sureties, he cannot retake the property as provided in section five hundred and fourteen, which reads as follows:

“At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it be claimed by a third person.” (See §§ 514 and 519 C. C. P.)

In the case of *Fleming v. Wells*, opinion filed in department one of the supreme court, June 17, 1884, an appeal from a judgment on the pleadings, for a delivery to plaintiff of the property mentioned in the complaint, or in case a delivery could not be had, for its value, damages for detention, costs, etc., the court say:

“The answer avers facts, fully and at large set forth, from which it appears that prior to the commencement of the present action, one Hawley commenced an action against the plaintiff herein and one Fowler, to recover the identical property described in the complaint

herein. That in that action, upon proper affidavit, undertaking and order of the attorney for plaintiff therein (which were forthwith served on the defendants therein) the present defendant, as sheriff, took said property from the defendants on the 12th day November, 1881. That on the 17th day of the same November (the day after the present action was commenced) the plaintiff herein made affidavit for claim and delivery and executed bond, which affidavit and bond (together with an order of the attorneys for plaintiff herein) were delivered to an *elisor*, appointed by the court, by whom the property was taken from the defendant herein, sheriff as aforesaid. That afterwards on the 22d of November, 1881, defendant gave the undertaking provided for in such case by the code, and demanded a return of the property of the *elisor*, who on the same day delivered the property to the present defendant. That defendant, sheriff, thereupon *delivered the property to Hawley*, the plaintiff in the action wherein plaintiff and Fowler were defendants. That afterwards, on the 12th day of December, 1881, the plaintiff herein filed an answer in the action, wherein he and said Fowler were defendants, in which he demanded a return of the property, therein and herein sued for. That the action *Hawley v. Fowler and Fleming* came on to be tried on the 21st day of January, 1882, and at the conclusion of the evidence on the part of the plaintiff therein, the court, on motion of defendants, ordered a judgment of *nonsuit* in that action, on the ground that plaintiff had not made out a case sufficient to go to a jury, and thereupon a judgment was entered in favor of defendants therein for their costs.

“The court below held that the facts set forth in the

answer constituted no defense to the present action.

“For the purposes of the judgment on the pleadings the averments of the answer must be treated as true.

“Certainly the defendant here did not *take* the property from the plaintiff *wrongfully*, but as sheriff under process which made it his duty to take it.

“Before the expiration of five days, at the expiration of which it would have become the duty of the sheriff, (defendant herein) to deliver the property to Hawley, the present action was commenced and the property taken by the *elisor*. When the property was returned to the sheriff, on his giving bond, etc., he did what was his plain duty to do, deliver it to Hawley.

“The present plaintiff did not give the bond provided for in section 514 of the Code of Civil Procedure, which alone would have authorized him to demand a return of the property taken by the sheriff, but, instead of executing and tendering the bond, commenced this independent action against the officer. As we have said no right of action for a recovery of the property from the sheriff existed in favor of the plaintiff when the present suit was begun.

“Nor was the sheriff permanently relieved of the duty of delivering the property to Hawley, by the circumstance that it was taken out of his possession by the *elisor*. As soon as it was returned to him the duty attached of delivering it to Hawley, plaintiff in the action, at whose instance it had been taken by the sheriff. This duty he performed. Even if the judgment of nonsuit could be construed to be a judgment that defendants were entitled to a return of the property by Hawley, the judgment in the present suit could not be upheld. Prior to the rendition of the

judgment of nonsuit, the present defendant, in strict accordance with his duty as sheriff, had delivered the property to Hawley, and the judgment (construed as a judgment for a return), required *Hawley*, and not the present defendant, to return the property or pay its value, in case return could not be had. As the sheriff rightfully took the property from the present plaintiff, and simply discharged his duty in delivering it to Hawley, he cannot be held liable for the property, or its value and damages, at the suit of the present plaintiff.

“It may be added that, in the action brought by Hawley, the defendants did not recover a judgment for a return of the property by the plaintiff therein or its value. The defendants in that action asked for a nonsuit and got what they asked for. If under the circumstances they could complain of the judgment, because it did not provide for a return, etc., the remedy was to be sought in that action, in the superior court, or by appeal.

“Even if it could be held that a judgment might properly be entered against the present defendant if he came wrongfully into possession of the property *after* the action was brought, although his possession when the action was commenced was rightful, the facts do not show such subsequent wrongful possession. Moreover, if it could be held, that in case a judgment for a return of the property to defendants by Hawley had been entered in the action brought by him, it would have become the duty of the sheriff to take the property from Hawley and deliver it to defendants therein (and that it was a duty which he could be compelled to perform in this *independent action*), no judgment was in fact entered in the action brought by

Hawley for a return of the property to the defendants in that action. Judgment reversed."

§ 43. Officer Responsible until Sureties Justify.—If the defendant elect to retake the property, the officer is still to retain it until the defendant's sureties justify; unless, indeed, he is willing himself to take the risk of such justification. The effect of a demand of the property by the defendant is not to entitle the defendant to have the property delivered to him, but to prevent a delivery of the property to the plaintiff. If the defendant would have the property himself, he must proceed to have his sureties justify. The property must be retained by the officer until such justification takes place, unless the officer chooses to make himself personally responsible that the sureties shall justify. (See § 515, C. C. P.)

§ 44. Notice of Justification.—The defendant's sureties, upon notice to the plaintiff of not less than two and not more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time; if they, or others in their place fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (§ 515, C. C. P.)

§ 45. How Property Taken when Concealed.—If the property, or any part thereof, be concealed in a building or inclosure, the sheriff must publicly

demand its delivery; if it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county. (§ 517, C. C. P.)

§ 46. Claim of Property by Third Person.—If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the defendant, or his agent, is valid against the sheriff unless so made. (§ 519, C. C. P.)

The action of replevin cannot be maintained under our laws against a sheriff to recover the possession of personal property held by him under a writ of replevin, unless a claim upon him for such property has been first made under section 519, Code Civil Procedure. But when a third party claims the property, the officer should demand indemnity at once from the plaintiff, for he can no more take the property of a stranger under replevin than he can under attachment or execution, without rendering himself liable.

§ 47. Sheriff Liable for Taking Property of Stranger.—Where an order of court directed the sheriff to seize certain specific property, and this property was proved not to belong to the defendant in the

suit, the sheriff was held liable to the owner. (*Rhodes v. Patterson*, 3 Cal. 469.) And further, that the owner of property has his remedy and the right of recovery, against any one, whether sheriff or not, unless it be held by legal process against himself.

In the case of *Bacon v. Robson*, 53 Cal. 399, the court held that in an action to recover personal property or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown.

§ 48. **Bond of Indemnity to Sheriff.**—If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. (*Lott v. Mitchell*, 8 Cal. 23.)

§ 49. **Correction of Valuation of Property.**—When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the

affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made. (§ 473, C. C. P.)

§ 50. **Property Lost through Act of God.**—It is no defense to an action upon a replevin bond that the property was lost through the act of God. By section 667 of the Code of Civil Procedure, it is provided that, "if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same." When it appears on the trial that the property has been destroyed, that it no longer exists in *specie*, and cannot, therefore, be returned, a judgment for damages alone will not be reversed. (*Brown v. Johnson*, 45 Cal., 76.) In the case of *Geneva de Thomas v. Witherby and Coyne*, (opinion reported in the *Pacific Coast Law Journal* as having been filed July 25, 1882) the plaintiff pleaded that two cows known as graded stock died, thereby rendering it impossible for plaintiff to return said cattle to defendants. It was held that this was no defense. The court said: In some of the cases to which we have been referred, it has been held that the plaintiff, who obtains the possession of personal property by replevin, is excused from returning the same in case it has died since the seizure, without any neglect or default on the part of the party taking it. This was the doctrine laid down by the Supreme Court of New York, in *Carpenter v. Stevens*, 12 Wend., 589. It was there held that, "when property taken by virtue of a writ of replevin is a living animal, and there is a judgment of *retorno habendo*, in

an action on the replevin bond for a breach of its condition, it is a good plea in the bar that before the judgment in the replevin suit, the animal died without the default of the plaintiff in such suit ;” and to the same effect is the case of *Melvin v. Winslow*, 10 Me., 397. But an examination of more recent cases and later authorities, convinces us that the above cases do not lay down the correct rule on this subject. The case of *Carpenter v. Stephens*, *supra*, was considered by the Superior Court of New York in the case of *Suydam v. Jenkins*, 3 Sandf. 614, where it is said: “The inferences that have been stated seem to follow in a logical sequence, and if the decision in *Carpenter v. Stevens* were admitted to be law, we should find it difficult to admit them. But this admission we cannot make. The decision is one of those which we regret, but are constrained to say, we cannot follow. It appears to us to be wrong in principle, and it is plainly contradicted by many authorities. The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods or pay the value at the time of the execution of the bond. We cannot think that a wrong-doer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. A plaintiff who, without right or title, has seized the property of another by writ of replevin, is as much a wrong-doer as a defendant *in trover*. No reason can be given why his liability should be less extensive ; and, in fact, when the replevin suit is terminated, although he cannot be treated as a trespasser, he may be sued *in trover* at the election of the defendant. (*Yale v. Passett*, 5 Denio, 21). The decision in *Carpenter v. Stevens* is plainly inconsistent with the prior decision of the same court in *Rowley v. Gibbs*,

(14 John. 385), in which the defendants in a replevin suit, in addition to a return of the goods, were held to be entitled to damages for a deterioration in their value, from the time of the replevin, although it was not pretended that the decrease in value was attributable in any degree to the act or default of the plaintiff; and it is irreconcilable with the numerous cases in which it has been held expressly, or by a necessary implication, that in a suit upon a replevin bond, the value of the property, as fixed by the penalty of the bond, is, at the election of the plaintiff, the true measure of damages." (Citing *Mattoon v. Pearce*, 12 Mass., 406, and numerous other cases).

The case of *Carpenter v. Stevens* is referred to with disapprobation by Wells in his recent work on replevin. He says: "Questions frequently arise as to the effect the death or destruction of the property, pending the suit, will have on the rights of the parties. Upon this question the authorities, with few exceptions, can be easily harmonized. It was said in a New York case that when the property sued for is a living animal, and it dies, it is a good plea to say that it is dead. This ruling was based upon the idea that the return had become impossible by act of God; but the ruling has been questioned more than once. To permit a defendant who wrongfully takes possession to claim that he holds it at the risk of the real owner, and not at his own, and claim immunity from accident, would be unjust in the extreme. The wrongful taker of property, when called to surrender it to the rightful owner or pay the value, cannot defend himself from judgment by showing his inability to deliver it through death or otherwise." The death of slaves, pending the action for them, has often been held not to defeat

the plaintiff's right to a judgment for them or their value. Sedgwick, in his work on Damages, vol. 2, marginal page 500, also refers with disapprobation to the case of *Carpenter v. Stevens*, and says: "In a case in New York it was decided in a suit on a replevin bond that the non-return of the property was excused by its inevitable destruction before judgment. This decision was based on the old rule that if the condition of a bond became impossible by the act of God, the penalty is saved. But it seems contrary to principle, and has been expressly disapproved of. As between parties to a contract it seems very reasonable that all interested in its execution should bow to the Superior Power which renders its performance impossible. But it cannot be contended that a wrong-doer should be excused by any subsequent event. Nor do the analogies of the law justify any such decision."

In the case of *Mills v. Gleason*, 21 Cal. 280, the court say: "A failure to prosecute (replevin) is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained."

In the case of *de Thomas v. Witherby*, the court sums up as follows: The weight of authority is manifestly against excusing the party who has replevined goods, from returning the same or responding in damages for their value, because they have been lost by the act of God, and it appears to us that upon no sound principle can he be excused. A plaintiff not being the owner of goods who takes them out of the possession of the real owner, holds them in his own wrong, and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the

litigation; and when at the end of perhaps a protracted litigation it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he cannot, on principle or authority, be excused from satisfying such judgment under a plea that the property has been lost in his hands, even by the act of God.

§ 51. **Attachment Lien in Replevin.**—The question as to whether the lien of attachment continues after the replevy of goods is decided affirmatively by the supreme court in the case of *Hunt v. Robinson et al.*, 11 Cal., 262. This was an action against the sureties on a replevin bond. The facts as detailed in the opinion of the court are as follows: Treadwell commenced suit against David Jones, by attachment, which was levied upon certain personal property by the plaintiff Hunt, as sheriff of Sacramento County. Mary Jones, wife of David Jones, claimed the property as a sole trader, and commenced her action of replevin, and obtained possession of the property, upon delivering an undertaking as required by the 102d section of the Practice Act, executed by defendants, Robinson and Skinker. The replevin suit was decided on the 5th of February, 1855, in favor of Hunt, and a motion made for a new trial by Mrs. Jones, which motion was pending until March 9, 1855, when it was overruled. Treadwell obtained judgment against David Jones, Nov. 30, 1854, for \$4,300. On the 18th of February, 1855, certain executions in favor of *other* creditors of David Jones being in the hands of the plaintiff Hunt, were levied by him upon the same property, and the property sold about the last of February. The sheriff,

being in doubt as to which of the several creditors were entitled to the proceeds of the sale, paid the money into the 6th District Court, and filed his bill of interpleader, making Treadwell and the other creditors parties. Upon the hearing, the District Court decided that the second class of creditors were entitled to the proceeds. From this decision no appeal was taken by any party. On March 17, 1855, Hunt issued his execution upon the judgment obtained by him in the replevin suit, which was returned by the coroner unsatisfied. The sheriff then brought his suit against the sureties in the replevin bond, and obtained judgment against them for the assessed value of the property replevined, and for costs, and the defendants appealed to the Supreme Court, which court decided that the lien of Treadwell's attachment continued after the replevy of the goods by Mary Jones. When the same property came into the hands of Hunt, as sheriff, the condition of the replevin bond, to return the property, was fulfilled. The property was then liable to a second levy, but such second levy was subject to the levy under the prior attachment.

CHAPTER IV.

INJUNCTIONS.

§ 52. May be Served on any Day.

§ 53. How Served.

§ 54. When Served on Sheriff.

§ 52. **When may be Served.**—Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days. (§ 76, C. C. P.)

§ 53. **How Served.**—The injunction is served by delivering a copy, showing the original, and informing the person served of the contents thereof. The statute points out no mode of service of an injunction; but it is held in *Edmondson v. Mason*, 16 Cal., 387, that in conformity with the provision relative to the summons, delivery of a copy is essential to personal service, where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, no opinion is expressed by the court. To avoid possible complications, the method above indicated should be followed.

§ 54. **When Served on Sheriff.**—Where a sheriff

levies on and is about to sell property of an execution debtor, and the defendant in execution obtains from the court in which the judgment was rendered an injunction restraining the plaintiff in the judgment, his servants, etc., from proceeding to sell under such execution, and this injunction is served upon the sheriff, who in defiance of it afterwards makes the sale, he is a naked trespasser, and liable in damages—even though he be not a party to the injunction suit. It was so held, in the case of *Buffandeau v. Edmondson*, sheriff, 17 Cal. 437, and that it was unnecessary to consider whether the bill of complaint showed a proper case for an injunction, or whether the injunction was regularly granted or not. It was enough for the sheriff to know that a court of competent jurisdiction had made the order, and then it became his duty to obey it. It is no part of a sheriff's duty to sit in judgment upon judicial acts, and reform the errors and revise the orders of the judge. The injunction, so long as it remained in force, operated as a *superseas* to the execution; the legal authority to sell the property was withdrawn by the same authority which had given it, to wit: by the act of a competent court; and the sheriff had no more legal justification for his act than if he had proceeded to sell after the execution had been quashed. The injunction in this case had direct effect upon the process itself, and though, in order to charge the sheriff, it was necessary that he should have notice of the order, yet, after such notice, his act was in defiance of law, and in contempt of the court. The principle is familiar enough to need no citation of authority, that a sheriff cannot seize or sell the property of a citizen, unless he has legal process authorizing it; and that process which has been

superseded is no authority at all when the officer is duly notified of the order of *supersedeas*. If the sheriff, without legal authority, converted the plaintiff's property, *prima facie*, he is responsible to the plaintiff for at least its value; and if he has any defense arising from the fact that the property was justly subject to the plaintiff's debts, and has been so applied, it will be time enough to inquire whether this is properly in mitigation of damages, when the defense is made and the facts presented.

CHAPTER V.

HABEAS CORPUS.

- § 55. How Served.
- § 56. The Return.
- § 57. Warrant of Arrest.
- § 58. When Writ may be Served.
- § 59. Service without Fees.

§ 55. **How Served.**—The writ of habeas corpus must be directed to the person having custody of or restraining the person on whose behalf the application is made. If it is directed to the sheriff or other ministerial officer of the court out of which it issues, it must be delivered by the clerk to such officer without delay, as other writs are delivered for service. If it is directed to any other person, it must be delivered to the sheriff, and be by him served upon such person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling-house or of

the place where the party is confined or under restraint. (§§ 1477-78, Penal Code.)

§ 56. **The Return.**—The person on whom the writ is served, must state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody, or under his power or restraint;

2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint;

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return. (See § 1480, Penal Code.)

No writ of habeas corpus can be disobeyed for defect in form. (§ 1495, Penal Code.)

Upon receiving a writ of habeas corpus, the officer should endorse upon it the time of its reception, and make and retain a copy of the writ. The author of this work has found that there is a diversity of opinion amongst attorneys and officers as to the manner in which this writ should be served—whether service should be made with the original writ or a copy thereof. Section 1478 of the Penal Code seems to require the service to be made with the original writ. And section 1479 gives weight to this construction by providing that, if the person to whom the writ is directed refuses, after service, to obey the same, the court or judge, *upon affidavit* (not upon any return of the officer who served the writ), must issue an attachment against such person, etc. Under the old common law practice, the original writ of habeas corpus was served upon the

person to whom it was directed. The same practice is followed in the State of New York, the codes of which state were closely followed by the code commissioners of California in codifying the laws of this state. Section 1480 of the Penal Code commands that "the person upon whom the writ is served must state in his return," etc. The statute contemplates but one return, and that is of the person to whom the writ is directed. A record of the service by the officer should be made in the court from which the writ issued, so that parties interested in the proceeding need not be compelled to seek the officer in person to ascertain if service had been made. To this end, a return may be made by the officer, and filed with the clerk of the court, upon a copy of the writ. Such return may be in the following form:

In the Matter of the Application of
John Doe
For a Writ of Habeas Corpus.

County of Alameda. ss. I hereby certify that on the.....day of.....1884, I served the writ of habeas corpus issued in the above entitled matter (a copy of which is hereto annexed) upon the said.....by delivering said writ to him personally at said County of Alameda.

[Signed].....

Sheriff of Alameda County.

§ 57. Warrant may Issue instead of Writ.—The court or judge may issue a warrant (instead of writ of habeas corpus) directed to the sheriff, coroner or constable, commanding the officer to take the per-

son held in custody, confinement or restraint, and forthwith bring him before such court or judge. A command may also be inserted in the warrant for the apprehension of the person charged with such illegal detention and restraint. (§§ 1497-8 Penal Code.)

§ 58. **When may be Served.**—Such writ or process may be issued and served on any day or at any time. (§ 1592 Penal Code.)

§ 59. **No Fees in Habeas Corpus.**—No fees can be collected in the service of any process in habeas corpus. (§ 4333 Political Code.)

CHAPTER VI.

ATTACHMENT ON REAL ESTATE.

- § 60. The Object of the Writ.
- § 61. Void Writs.
- § 62. Effect of New Summons.
- § 63. Where Debt is Secured by Mortgage.
- § 64. May be Levied before Service of Summons.
- § 65. Void for Want of Proper Undertaking.
- § 66. Liability of Officer on Void Judgment.
- § 67. Liability of Party Enforcing Void Judgment.
- § 68. Irregularity in Issuance.
- § 69. Attachment when Debt not Due.
- § 70. On Contract not Due in this State.
- § 71. Right to Intervene.
- § 72. What the Writ must State.
- § 73. Sufficiency of Sureties.
- § 74. Instructions to Sheriff.
- § 75. Directions must be in Writing.
- § 76. How Property must be Attached.
- § 77. How to Attach Fixtures on Realty.
- § 78. The Service on Occupant..
- § 79. The Service on Third Party.
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§ 60. **The Object of the Writ** of attachment is to secure, in the interest of the plaintiff, sufficient property belonging to the defendant to satisfy the

plaintiff's claim. It may be issued at the time of the issuance of the summons, or at any time afterward. It enables the creditor to authorize the sheriff to seize the property of the debtor and to hold it until the court can determine the respective rights of the parties by a judgment. This being the object of the writ, it is clearly the duty of the officer to use all due diligence in the service thereof. Any delay on his part may defeat this object, and render him liable to the plaintiff for whatever loss may be thereby sustained.

§ 61. **Void Writs.**—An attachment issued before the issuance of the summons in the suit, is void, and the subsequent issuance of the summons cannot cure it. (*Low v. Henry*, 9 Cal. 538:.) Section 405 of the Code of Civil Procedure provides that civil actions in the courts of this State are commenced by filing a complaint. Summons may issue at any time within one year. The plaintiff "at the time of issuing the summons, or any time afterward, may have the property of the defendant attached." These provisions must be strictly followed, and the attachment, if issued before the summons, is a nullity. The issuance of the summons afterwards cannot cure that which was void from the beginning.

It is not presumed that a county clerk or a justice of the peace will issue a writ of attachment before the summons. Such a procedure could only arise through the grossest negligence, and would not be excusable upon any plea of confusion caused by haste or multiplicity of duties requiring immediate attention at the time of the error. But if a sheriff receive information that no summons has been issued at the time the writ

is placed in his hands, he will serve the writ at his peril.

§ 62. **Attachment not Affected by New Summons.**—In *Seaver v. Fitzgerald*, 23 Cal., 86, in a suit commenced before a justice of the peace, if the summons be returned by the officer with his endorsement thereon that no service has been made because defendant cannot be found, and on the return day thereof it is further made to appear by affidavit that the defendant conceals himself to avoid service of process, the suit does not thereby abate, but the magistrate may continue the cause, issue a new summons, and make an order for its service by publication. In such case, when an attachment is regularly issued by the justice, at the time of the issuance of the first summons, the attachment is not vitiated by the failure to serve the first summons and the issuance of a second one, nor is the validity of the attachment in any way affected by the proceedings. The plaintiff contended that the second summons was *the* summons in the case, because that was the summons served by publication, and as the writ of attachment was issued before this second summons, it was therefore void. The court held that this point was clearly untenable, that a summons was duly issued before or at the time of the issuing of the attachment, and the attachment was therefore valid when it issued. The fact that the defendant absented himself so that the summons could not be served on him before the return day thereof, and that it was returned not served, could not have the effect of vitiating the attachment. No rule of law or provision of statute has been referred to by counsel to sustain any such position, and such a principle would be most pernicious in its consequences. It would only

be necessary for a debtor to conceal himself for a few days, until the return day of a summons issued against him had passed, to invalidate any attachment which had been issued against him. A principle so manifestly unjust in its results could only be sustained by clear and positive statutory provisions, which do not exist in our laws.

§ 63. **Where Debt is Secured by Mortgage.**—If an attachment be levied in an action for a debt which has been secured by a mortgage, the attachment will be dissolved.

§ 64. **Attachment may be Levied before Service of Summons.**—Although the writ of attachment may not be issued before the summons, it may be served before the summons is served. The service of the summons cuts no figure in the attachment. The attachment cannot, but the summons may, be served by a private person.

§ 65. **Attachment Void for want of Proper Undertaking.**—Where the undertaking given on issuing an attachment from a justice's court was to the effect that plaintiff would pay all costs, etc., and the damages the defendant might sustain by reason of the attachment, "not exceeding one hundred dollars": *held*, that the undertaking was bad, and rendered the attachment void because not issued in substantial conformity with the provisions of the 553d section of the Practice Act. (*Hisler v. Carr*, 34 Cal. 641.) In the same case it was held that where the affidavit failed to show that the plaintiff had a cause of action against defendant, the summons which was made returnable

more than ten days from its date was void, as was also an attachment issued in the same case.

§ 66. **Liability on Void Judgment.**—In suit on account against Randall & Inos, partners, the former only being served with process, a joint judgment was rendered against both: *Held*, that the judgment is void as against the party not served. (Inos v. Winspear, 18 Cal. 397.)

§ 67. **Liability of Party Enforcing Void Judgment.**—*Held, further*, that where the execution on such joint judgment directed the officer “to levy of the goods and chattels, land and tenements of the said *judgment debtors*,” said sum, etc., the officer is authorized to seize the individual as well as joint property of the judgment debtors; and hence, that where the officer seized and sold under such execution the individual property of the party not served with process, the justice of the peace issuing the writ, and the plaintiff therein—at whose request it was issued, who took part in the proceedings and received the proceeds of the sale—are each liable to the party not served in damages for the seizure.

§ 68. **Irregularity in Issuance of Attachment.**—Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it till next day, and after other attachments on the same property, when it was signed by the clerk, with the name of the plaintiff’s attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. (Dixey v. Pollock, 8 Cal. 570.)

§ 69. **Attachment where the Debt is not Due.**

—An attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it. *Patrick v. Montader*, 13 Cal. 434, goes upon the ground that the debt on which the attachment issued was *equitably due*, and hence does not conflict with the rule laid down here. (*Davis v. Eppinger*, 18 Cal. 379.)

§ 70. **Contract not made in this State.**—If a

contract is not made in this State, there must be an express stipulation that it shall be paid in this State, in order to authorize the issuance of an attachment in an action upon it. (*Eck v. Hoffman*, 55 Cal. 501.)

§ 71. **Right to Intervene.**—Where a subsequent

attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims. (*Coghill v. Marks*, 29 Cal., 673.)

§ 72. **What the Writ must State.**—The writ

must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to

the value of the property which has been or is about to be attached; in which case, to take such undertaking. (§ 540, C. C. P.)

§ 73. **Sufficiency of Sureties.**—If the defendant desires to give the undertaking mentioned in section 540, Code Civil Procedure, the officer should satisfy himself that the sureties are able to respond to the obligation they assume. He should question the persons who present themselves to him as sureties, concerning their property qualifications, and seek to secure the plaintiff as he would himself.

§ 74. **Instructions to Sheriff.**—The writ should be accompanied with written instructions directing the officer as to the property to be attached; and when the property is real property, the directions should state in whose name the property stands of record. The best form of instruction to the sheriff should contain such a description as would give satisfaction if contained in a deed; for, if the cause is prosecuted to judgment and sale, and a deed pass to the purchaser, the description of the land given in the first proceeding will follow to the deed. Although the officer is bound to attach property belonging to the defendant without written instructions to do so, if he know of any that is not exempt within the county, yet, if such directions are not given, he may afterwards seek to excuse himself from neglect by pleading ignorance or uncertainty of ownership. Where specific instructions are given in writing, the party desiring the levy, and the officer, at once arrive at a mutual understanding as to the work to be done.

§ 75. **Directions of Attorney must be in Writ-**

ing.—No directions or authority by a party or his attorney, to a sheriff, in respect to the execution of process or return thereof, or to any act or omission thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing signed by the attorney of the party, or by the party, if he has no attorney. (Political Code, § 4185.) This provision will not excuse an officer from performing any duty incumbent upon him in serving process and taking property.

§ 76. How Real and Personal Property should be Attached.—The sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in section 540 be not given, the attachment must be made as provided in section 542 of the Code of Civil Procedure. The officer is not bound to look up the defendant to ascertain if he wishes to give the undertaking, nor would it be proper for him to delay executing the writ for that purpose.

1. Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached,

2. Real property, or any interest therein, belonging to the defendant and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the

recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein, held by or standing in the name of such other person, (naming him) are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property.

3. Personal property, capable of manual delivery, must be attached by taking it into custody.

4. Stocks or shares, or interest in stocks or shares, of any corporation or company must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5. Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

§ 77. How to Attach Fixtures on Realty.—Where the attachment or execution is to be levied upon steam boilers, engines, pumps, or other articles

that have been attached to the realty so as to become a part thereof, the levy should be made in the manner provided in subdivision 2, section 542, Code of Civil Procedure. It is the interest of the defendant in the land which is to be attached. And where such fixtures are, from their nature or exposed condition, liable to clandestine removal, or injury through malice or otherwise, the officer will be justified by consent of the plaintiff in putting a keeper in charge thereof to take care of the property so that he may have it intact at the time of sale. If the plaintiff decline to incur the expense of a keeper, he cannot complain of laxity on the part of the officer, if the property is lost or injured through lack of care on his part.

§ 78. **Service on Occupant.**—In attaching real estate it is not necessary to go to the land, if an occupant can be served with a copy of the writ, description, and notice, without going to the land. It is not necessary to serve the defendant with a copy of the writ, description, and notice, except he be the occupant of the land attached. A person may be an occupant of real estate although there be no buildings upon it. He may occupy the bare land for the storage of hay, or any other commodity. If he be an occupant in any capacity, he is entitled to notice of the levy, and a service upon him will be a service upon an occupant within the law. The service of the writ, description and notice upon an occupant (if there is one) is made by personally delivering to and leaving the copy with the occupant.

§ 79. **Service on Third Party.**—When the person, who is not the defendant, and in whose name

the property stands on the records, is not in the county, and has no agent in the county, and neither he nor any agent of his have a residence in the county, and the service contemplated in the foregoing paragraph cannot thus be made, the attachment will not for that reason be invalidated, but such facts should be set out in the return made by the officer on the writ.

§ 80. **Posting Copy on Real Estate.**—If there is no fence or building upon the land attached, the posting may be done by setting a post or stake in the ground and attaching thereto the copy of the writ, description and notice.

§ 81. **What Constitutes Complete Attachment.**—To complete the service and create a lien, both the acts required by the law must be performed. Neither act, by itself, will amount to a service of the attachment and create a lien on the property. The performance of both acts is essential to create a lien. (*Wheaton v. Neville*, 19 Cal. 44; *Main v. Tapence*, 42 Cal. 209.) But, in addition to this, the requisite acts must be performed in the order in which they are named in the code—that is to say, the filing of a copy with the recorder must precede the service on an occupant or the posting on the premises. The lien of an attachment of real property is not perfected until both the acts prescribed by the statute, to wit: filing with the recorder a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, or posting a copy on the premises if there be no occupant—are performed. It

has been decided by the supreme court, in the case of *Wheaton v. Neville, et al.*, 19 Cal. 43, and affirmed in subsequent decisions, that the omission of either act is fatal to the creation of the lien. It is therefore clearly the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with diligence. In the case of *Wheaton v. Neville, et al.*, the writ of attachment was issued at the commencement of the action of Scott, Vantine and others against Brown, on the 26th of August, and a copy was delivered to the occupant of the premises on the 29th of the same month. (The statute at that time required service on the property before filing with the recorder.) On the 29th of August, the writ was returned with a certificate of the sheriff's proceedings, and filed in the clerk's office; but no copy of the writ, with a description of the property, was filed with the recorder until the 9th of September following. On the 6th of September, one Dimock purchased and took a conveyance of the premises from Brown, and the question for determination was, whether the subsequent filing of the papers in the recorder's office gave effect to the attachment from the date of the posting or delivery of the copy of the writ, so as to create a lien upon the premises. The supreme court decided that the filing in the recorder's office had no such effect; that after the return of the writ to the clerk's office, the sheriff had no authority to take any proceedings for the completion of the attachment, which he had previously omitted. Its efficacy, as a warrant of authority to him, was limited to acts performed whilst it remained in his possession.

§ 82. Lien on Real Estate, when takes

Effect.—The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and a deposit of a copy of the writ, together with a description of the land attached, with the county recorder. (Ritter v. Scannell, 11 Cal. 239.)

Under the old law, as interpreted in the above, the service on the occupant or posting on the property was required to be done before filing with the recorder. The practice is reversed under the present law.

Such lien cannot be diverted by the failure of the sheriff to make a proper return of the writ.

Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained.

The deposit in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. (Ritter v. Scannell, 11 Cal. 239.)

§ 83. How Attachment may be Released.—

Until the year 1876, there was no method prescribed by statute for the release of an attachment upon real estate on the records of the county in which the property was situated. At the session of the legislature in that year, a clause was added to section 559 of the Code of Civil Procedure, providing that "whenever an order has been made discharging or releasing an attachment on real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner," It then became quite generally the custom, among sheriffs and constables, to release attach-

ments upon real property by filing with the county recorder a certified copy (certified by the officer) of the order of plaintiff's attorney to release the attachment. This was held, not only by many attorneys and officers, but also by searchers of records, to be a valid release. But an opinion was filed in the case of *Smith v. Robinson*, May 11, 1883, in which the supreme court held that the code authorizes no release or discharge of an attachment upon real property, except by *order of court*. It may be admitted (say the court) that under our system of practice, the attorney for plaintiff may consent to an order releasing an attachment, but the code authorizes no release except by order of court. Subsequently, however, on the 27th of December, 1883, the supreme court, in bank, reversed the decision referred to, deciding that a plaintiff, without order of court, may direct the sheriff to release real property attached.

§ 84. **Return of Attachment.**—A sheriff has no right, after making a return, to amend it so as to affect rights which have already vested. (*Newhall v. Provost*, 6 Cal. 85.) The return on attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the correction. (*Webster v. Haworth*, 8 Cal. 21; *Newhall v. Provost*, 6 Cal. 85.) It is the duty of the sheriff, when returning an attachment of real property, to indorse thereon what acts he performed in serving the writ, and it will be presumed that he states all that he did towards making the service.

Where an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to

return that he has attached the interest of the defendant in the property then in his possession. (O'Connor v. Blake, 29 Cal. 313.) While such a return may be only necessary, it would be proper and more satisfactory to parties interested who desire information regarding the officer's proceedings, to state in the return that the property was attached subject to levy under certain prior writs. The plaintiff should be enabled to ascertain, from the return on file in the clerk's office, what advantages he has gained under the writ; and where a return only states a portion of the officer's proceedings, it is liable to mislead.

CHAPTER VII.

ATTACHMENT ON PERSONAL PROPERTY.

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§ 85. **Receiving the Writ.**—An attachment is a process under which the debtor's property may be seized and held as security for the satisfaction of any judgment that may be recovered against him in the action, unless he gives security for the payment of the judgment, in the manner provided by the statute. The purpose of the lien is to secure the payment of the judgment, and this is accomplished by its holding the property until the judgment is rendered—and in case

of real property, until the judgment is or may be docketed—so that the attached property may be taken and sold under an execution to be issued on the judgment.

No property may be taken in attachment that is not liable to seizure under the execution when issued, and the only way in which the levying of the attachment upon the property operates as security for the satisfaction of the anticipated judgment, is by its capacity to hold the property to await the execution to be issued. This is necessarily implied by section 550, Code Civil Procedure, providing for the sale of the attached property, and no other mode than a sale under execution is provided by the statute, for enforcing the attachment lien upon property held under the writ. Property that has been converted into money, because the interest of the parties required its sale while held under attachment, forms no exception to the usual course of proceedings respecting property held under attachment, for the money in the officer's hands, though not required to be levied upon under execution, because not required to be sold, can be applied to the satisfaction of the judgment only when the plaintiff is entitled to an execution, and it is appropriated in the same manner as when made under the execution.

Personal property, capable of manual delivery, must be attached by taking it into custody. (§ 542 C. C. P.) This is a plain, mandatory provision of the law. It must be taken into actual custody, and no unnecessary time should be lost in executing the writ. It not unfrequently happens that the defendant in the action has become suspicious that proceedings are about to be taken against his property, and that to avoid the an-

anticipated seizure he is seeking to transfer his effects. In such cases, moments of time lost represent property fleeting as with wings, and the creditor is thus momentarily in danger of losing his debt. The object of the writ is to enable him to secure his claim, if it be a just one, and the law places the services of the officer at his command to accomplish that purpose. After carefully inspecting the writ to assure himself that it is in due form, and complying with the legal requirements relating to his fees for service, the officer must endorse upon the writ the time of its reception. He should proceed at once to the place indicated to him as the location of the property, and take it into custody, unless the defendant give him the statutory undertaking to prevent the attachment.

§ 86. Responsibility in Service of Process.—

The supreme court has declared, in the case of *Whitney et al. v. Butterfield et al.*, 13 Cal. 336, that in the service of process the sheriff is responsible only for unreasonably, or not reasonably, executing it; that he is not bound to start on the instant of receiving a writ to execute it, without regard to anything else. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ—no special circumstances being shown. As the case above referred to contains several points of interest, the decision is herewith given in full:

“This question touches the liability of the sheriff for

not levying an attachment put in his hands on Sunday; the goods of defendant having been seized by his deputy on Monday, though the last writ came to his hands early on the same day, and was levied on the property which was disposed of by the last writ—so that the first remained unsatisfied. The principles which determine this case we think somewhat different from those argued at the bar.

“The sheriff’s liability rests on his breach of official duty. As he is bound to perform his duty, so is he responsible to everyone who may be injured by his failure to discharge it. In respect to the execution of process, these official duties are well defined by law. The law is reasonable in this, as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment, he must do it. But he is not held to the duty of starting on the instant after receiving a writ, to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has execution against A., and has no special instruction to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligations to execute it

instantaneously as if he were so instructed and there were circumstances of urgency. So, in respect to an attachment. If an attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the state, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action. But, generally, in the absence of special circumstances, an attachment issued for the security of a debt, under the old statute authorizing such a process, does not stand upon a more favorable footing, so far as regards the necessity of immediate service, than an execution.

“It is true the statute (Wood's Dig. 183, § 125,) directs that the sheriff ‘shall execute the writ of attachment without delay;’ but this was not intended to introduce a new rule. The expression, ‘without delay,’ does not mean that the sheriff shall, the instant he receives process of this sort, lay aside all other business and proceed to execute it, unless some special reasons of urgency exist. The rule is thus stated by the Supreme Court of New York, in *Hinman v. Borden*, (10 Wend. 367): ‘A sheriff is bound to use all reasonable endeavors to execute process.’ It is true that some authorities hold the rule with more strictness. In *Lindsay's Executors v. Armfield*, (3 Hawks, N. C.) the sheriff was held liable for not levying from 7th October to 1st November, following—no explanation being offered for the failure. Mr. Justice Hall says, ‘the law declares it to be the duty of the sheriff to execute all process which comes to his hands, with the utmost expedition, or as soon after it comes into his hands as the nature of the case admits,’ and cites *Bacon Abridg. Sheriff N.* That author holds

the doctrine in the same language as that quoted. Mr. Justice Henderson, in the case in *Hawks*, states the doctrine a little different. He says: 'The sheriff should proceed with all convenient speed to levy the execution.' The learned American editor of Bacon cites, in support of the doctrine of the text, several cases, which we have examined. None of them sustain the rule in its strictness, even if we are to regard the doctrine of Bacon as laying down a different rule, so far as the liability of the sheriff is concerned, from that held in *Wendell* and other cases; for Bacon says, the 'sheriff must not show any favor, nor be guilty of *unreasonable delay*.' In *Kennedy v. Brent*, (6 Cranch, 187,) C. J. Marshall holds that the marshal is bound to serve the process as soon as he reasonably can.

"The question of unreasonable delay is a mixed question of law and fact, each case depending on its own circumstances; for, as we said before, the speed with which the sheriff must proceed may depend upon the apparent necessity for quick action. But we have found no case which holds that the mere delay of a few hours, without some showing of special urgency, has been held sufficient to charge the sheriff. If we suppose, then, that the process reached the hands of the principal sheriff at one o'clock on Monday morning, we do not perceive that the sheriff would have been liable—nothing else appearing—for failure to levy it before. But the particular facts of this case make it stronger for the sheriff. The attachment of plaintiff was placed in the principal sheriff's hands on the night of Sunday between nine and ten o'clock. But it did not legally come to his hands as sheriff and for service until twelve o'clock. Fifteen minutes after twelve the other attachment came to the hands of the

deputy; of this, it seems, the sheriff had no notice; and the deputy levied it at or about one o'clock. It seems, then, that the laches of the sheriff in delaying this levy for an hour at midnight, is the foundation of his liability. This would be too harsh and unreasonable a requisition. It is plausibly argued that the deputy and his principal are the same person in law; and that the attachment in the hands of the defendants is, in legal effect, in the hands of the principal; and, consequently, the case is that of an officer having a senior writ and levying a junior writ on the property of the defendant. But the answer to this argument is, that here the question is one of diligence; and that it cannot be contended that the mere omission of the deputy to inform the principal of his having process is such negligence as to charge him.

“We have seen that the sheriff is not absolutely responsible for not executing process of this sort. He is responsible for unreasonably or not reasonably executing such process. But the test is, was a failure, in the absence of any special circumstances, to execute *this* process, unreasonable, or did it subject the sheriff to responsibility for the debt? We may, in this connection, leave out of question the discussion as to the day (Sunday) on which the writ of the plaintiff was received. It is certain that, for all judicial purposes, Sunday is no day at all. The sheriff need not, on that day, indorse on the writ the fact of its reception. If given to him on that day he did not receive it as an officer, but as the mere agent of the plaintiff. He could do nothing with it on that day. He might, if he chose, recognize the receipt of it, but it imposed on him no higher or other duties than if he had received it on the next day. He, for all practical purposes, so

far as respects this writ, was not the sheriff at all on Sunday. But we may safely concede, for all purposes of this suit, that he received the process on the next day, and even at the beginning of that day. Was he bound, then, on this assumption, to go on and execute the writ, immediately after having received it, no peculiar necessity or apparent reason being shown why he should do so? No authorities have been cited to show that a sheriff is bound to quit everything else, immediately, on receiving an attachment or execution, and proceed to levy.

“The deputy had received Clark & Co.’s attachment early in the morning of Monday; perhaps at the very instant which marked the period which separated Sunday from Monday in the computation of time. But though Whitney’s writ was in the hands of the sheriff before this time, yet the sheriff could do nothing with it—did not legally even receive it in his official capacity before. His connection with the writ of Whitney, as sheriff, commenced at the very time—at the utmost—when his deputy had the writ of Clark. But if Clark had no writ, we do not see that the sheriff would have been bound to go at once, on the instant when Monday commenced, and levy on the property of the defendants in attachment. Nor was the sheriff bound to the degree of diligence which required him to communicate to his deputy the intelligence that he had received the writ of Whitney before the deputy levied the process of Clark. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy, and the attachment first levied, by our statute, has the priority.

“But, probably, we might put this case on a broader

ground. The sheriff could no more officially receive a writ on Sunday for service on Sunday, than he could execute it on Sunday. Both these acts are of the same general character, and equally within the prohibition of the statute. Not receiving it then as sheriff, he received it as the mere agent of the plaintiff. He so received it, not to execute it on Sunday, or to deal with it as a writ coming to him on that day as an officer. He might have been bound, as an agent, to deliver it to the sheriff, or to treat it as delivered when he could act. But this was a personal, not an official contract; it was a mere bailment which bound him, probably, as a man, but did not bind him as a sheriff, and, if he chose to disregard it entirely, we do not see that he would be bound as an officer. It is not necessary to press this point, for the reason that if he was bound to consider it as placed in his hands on Monday, at one o'clock, there was no such negligence in failing to execute it before, as to subject him to liability. It is true that it may be urged that the sheriff and the deputy are one person in law; true, so far as this, that the sheriff is responsible for the acts of the deputy; but no one would contend that if a sheriff has a deputy at a remote precinct of a county, and a writ is placed in his hands, and he executes it on property in his precinct, that the sheriff would be responsible for this, if the consequence were to deprive B of the recovery of a claim, as the result of this levy—B having put a writ in the hands of the sheriff, at the county seat, an hour before the writ was placed in the hands of the deputy. Whitney trusted the sheriff to consider that the writ would be in his hands on Monday, and to receive and execute it as if it were handed to him on that day; but even if it had been, the sheriff

was not bound to get out of his bed (no special circumstances existing) on the morning of that day, at one o'clock, and immediately proceed to the execution of the writ. It would be unjust to hold the sheriff to this degree of diligence, and, we think, illegal. We reverse the judgment and remand the case."

§ 87. **Liability from Delay.**—In proceeding to make a levy upon personal property, if the defendant express a wish to give the undertaking mentioned in section 540, Code of Civil Procedure, the officer may exercise his judgment as to whether he can safely abstain from levying until the defendant shall have had sufficient time to get his sureties and execute the undertaking. In deferring a levy, however, the officer does so at his own risk. The property is within his reach, and he becomes responsible to the plaintiff for whatever loss may be sustained by reason of his neglect. In going to make a levy upon personal property, the officer will sometimes find it convenient to have with him a blank undertaking to prevent attachment, and, also, a blank undertaking for the release of an attachment. It is not obligatory upon him to have such blanks with him, but much time and annoyance may sometimes be saved by having them at hand, where the defendant wishes to retain the custody of his property.

§ 88. **The Undertaking Removes the Sheriff's Responsibility.**—When the sheriff takes a sufficient statutory undertaking, as provided for in section 540, Code of Civil Procedure, to prevent an attachment or to release property already attached, his duty in the premises is discharged, and he has no further responsibility in the matter, (*Curiac v. Packard*, 29 Cal. 194:

also, *Preston v. Hood*, opinion filed December 29, 1883.)

§ 89. **Form of Undertaking.**—A common law bond, in form, upon the prescribed statutory conditions, given to a sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the statute. (*Curiac v. Packard*, 29 Cal. 194.) In this case, the court decide that the undertaking, if sufficient, is to be taken by the sheriff when the property *has been* as well as when it *is about to be* attached.

§ 90. **Original Writ should be kept in Sheriff's Office.**—The code does not require that the sheriff shall give an attaching creditor notice of the levy of his attachment. Nor need he serve a copy of the writ upon the defendant. He is entitled to a copy if he demand it, upon payment of the lawful fee therefor; but if, in the exigency of haste to make the levy, the officer have no copy with him at the time, it may be delivered to him thereafter. The officer should make the levy with a copy of the writ, leaving the original writ, in all cases, at his office.

§ 91. **Authority of the Officer in Levying.**—The writ commands the officer to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, unless the defendant gives an undertaking, as provided in section 540 of the Code of Civil Procedure. If the property to be attached is in a store, he may seize and take away sufficient of the stock of goods to meet the requirements of the writ. He may attach money in a drawer or safe

or wherever found, but he cannot take property from the person of the defendant, except it be money or other valuables in a bag or package in the hand of the defendant. He may not break open the outer door or window of a dwelling house to make a levy, nor gain admission thereto by even lifting the latch of an outer door. But, if after gaining peaceable and lawful admission to the house, and there is property of the defendant therein, he may take it even if he be compelled to break the inner doors of the house to reach it. If property to be attached is in a building other than a dwelling, he may use whatever force may be necessary to enable him to serve the writ, but he must first announce his office and business and make demand for admission. If resistance is made to the service, he may call to his aid whatever assistance is needful. But he should not go away from the place where the property is situated, to procure aid, if he can avoid doing so, for he will do so at the risk of losing the goods during his absence. Personal property is not attached until it is within the view of the officer. The mere formality of standing at an outer door of a building in which goods are situated, and placing guards or keepers around the building does not constitute a levy.

The extent to which an officer may proceed, in the use of force, in the breaking into a building, to levy upon the goods of a debtor, has not been determined by any supreme court decisions of this State. Although a man's dwelling is by law deemed to be his castle and sacred from intrusion, it is not so with his warehouse, store, or place of business. It has been definitely settled in many of the older States whose laws are similar to those of California, that an officer cannot

break open the outer door of the defendant's dwelling, nor even lift the latch thereof to gain admission, to seize the defendant's property. After having gained peaceable entrance, however, he may break the inner doors, closets, drawers, boxes, chests, or trunks, to seize property. In all cases where force may be used, the officer should first demand admission. The outer door of the defendant's store or other place of business may be broken open by an officer to enable him to make a levy, but all undue violence should be avoided when possible.

§ 92. **What may be Levied upon.**—Plaintiff was walking along the street with a bag of gold coin in his hand. Two of defendants, a deputy sheriff and constable, seized him, and by force took the bag of coin from him. The court held (*Green v. Palmer*, 15 Cal. 412) that from its seizure thus situated, the plaintiff could not claim any exemption, as he might perhaps do in reference to money upon his person. Thus situated, it was like a horse held by its bridle, subject to seizure under execution against its owner.

As indicating an instance wherein money in the hands of a bailee may be attached, the case of *Chandler v. Booth*, 11 Cal. 342, is cited. Where A., who carried on a printing office, and was indebted to the hands of the office, placed in the hands of B. a certain amount of money, with directions to B. to pay the hands, which B. neglected to do, and where there was no evidence showing that the hands agreed to look to B. for their money, or that A. was indebted to the hands in an amount equal or approximate to the sum in B.'s hands, and the money was subsequently attached in the hands of B. at the suit of C. against A., it was held that the money was liable to the attachment.

The sheriff cannot attach money collected on execution in his own hands; if at any time such money is subject to other process in his hands, such process must be executed by the coroner. (*Clymer v. Willis*, 3 Cal. 363.)

Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment. *Id.*

The indebtedness of the maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. Nor can such indebtedness, after the maturity of the note, be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment. (*Gregory v. Higgins*, 10 Cal. 339.)

Property in the custody of the law, or in the hands of a receiver appointed by a competent court, is not liable to seizure without an order from the court having charge thereof. (*Yuba Co. v. Adams & Co.*, 7 Cal. 35; *Adams v. Haskell*, 6 Cal. 113.)

Funds in the hands of a receiver, in a suit for dissolution of a partnership, are subject to attachment at any time before a final decree of dissolution and distribution. (*Adams v. Woods, et al.*, 9 Cal. 24.)

§ 93. **Void Levy.**—A levy made by a constable on goods which he does not see or have in his possession is void. (*Herron v. Hughes, et al.*, 25 Cal. 556.) A levy brought about by unlawfully bringing

property from one jurisdiction into another for that purpose is held to be utterly void.

§ 94. **Void Levy upon Insolvent's Property.**—

A writ of attachment is effectual to change the title of personal property only from the time of the levy. A levy may be good as against the defendant in the writ, and not good as to third persons. The conduct of the defendant may make the levy good, by way of waiver, or estoppel, or agreement. As to third persons, there can be no levy when the officer does not know the subject of the levy—as where he stands at the door of a store, which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession. (Tafts *v.* Manlove, 14 Cal. 47.)

After a petition and schedule in insolvency are filed, the control and dominion of the insolvent's property are transferred to the court. And a creditor cannot, after such filing—certainly not after the order staying proceedings—seize the property. The order operates by its own force from its date, and no notice need be given of it to a sheriff with a writ against the insolvent. For example: An attachment issues against H., and the sheriff proceeds with the writ to his store, which is locked and fastened, front and rear, by iron shutters. The sheriff, with his deputy, stands at the door, guarding all entrance. H. now files his petition and schedule in insolvency, and the usual order of stay of proceedings is made. H. returns to the store and advises the sheriff of these things. The sheriff threatens to break open the store, when H. gives him the key, and he enters and levies. In this case (Tafts, assignee of Hill, insolvent, *v.* Manlove, 14 Cal. 48) it was held that the sheriff had no right to levy, and that the property vested in the assignee of the insolvent, sub-

sequently appointed, by relation, from the filing of the petition and schedule. (Tafts *v.* Manlove, 14 Cal. 47.)

As the writ of attachment is only effectual to change the title of goods from the levy of the process, the question arises, what constitutes a levy, valid and sufficient in law to vest the property? In the decision above referred to, the court says: "It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ, when it would not be good as to third persons. But we apprehend that this distinction is not based upon any difference in the legal requisites of a levy, but in the fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver, or an estoppel, or agreement that *that* shall be a levy which, without such conduct, would not be sufficient. However this may be, we can conceive of no principle of law, and have been referred to no case, which holds that the acts relied on by appellant constitute a levy. Waiving everything else, the essential element of an intention to levy prior to the entry seems to be wholly wanting, from anything we can see in the agreed statement. That the sheriff came to the house in order to make the levy is very certain; but that he intended to make, or considered he *had* made, a levy on goods in the house, by standing at one door and putting his companion at the other, does not appear. He made then no note or memorandum of the levy—did not, perhaps, even know what goods were in the store, their description or value; and besides this, demanded the key afterward and entered, and *then* seized the goods, took the inventory, and indorsed the levy. There is neither proof nor probability that, before this time, he considered he had seized the goods, or if he did, we think he was clearly mistaken.

“In Crocker on Sheriffs, section 425, p. 172, it is said: ‘A levy upon personal property is the act of taking possession of, seizing or attaching it by the sheriff or other officer,’ etc. It is true, the author, in section 427, says: ‘As against the defendant in execution, no great strictness of form will be necessary in making a levy upon personal property. Thus the mere entering by the sheriff of the property of the defendant, with his assent, upon the execution, will be conclusive upon such defendant, though the property is not present, and the officer does not *know* where it is.’ But this authority and the cases cited by appellant’s counsel, are far from proving the proposition they labor to sustain. It is not necessary to review these cases, for all of them turn upon a wholly different principle from that invoked. The principle, namely, that the assent of the defendant is sufficient as against him, even where the goods are not within view, or subject to the dominion of the officer.

“But it cannot be necessary to pursue this inquiry. It is too plain for argument, that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy upon the contents of a banking-house, as to stand in a store door at midnight, and claim that merely by standing there and preventing any person from coming into the store, he had levied on the contents, whatever they were, of the store; and this without having any knowledge of the nature of the stock, much less of the particular description or value. But, as we said before, nothing appears to show that the mere watching and guarding of the storehouse was meant to be a levy on the property inside; but these were acts merely in prosecution of the design to enter the house

and levy on the property there, which purpose was afterward accomplished.

“ But at this latter time the restraining order was made by the judge ; and this brings up the other and more difficult question—the effect of this order upon the plaintiff’s right to levy. If, before the petition of insolvency had been filed, the lien of this plaintiff had attached, the insolvent proceedings would not, under the statute, have divested it. But we have seen that no lien had attached until after the filing of the petition and the granting of the restraining order. By section 5 of the Insolvent Act (Wood’s Dig. 496) it is provided that the judge receiving the petition of the insolvent shall make an order requiring the creditors of the insolvent to appear, and show cause why the assignment of the insolvent’s estate should not be made and he discharged, etc. ; and by the 8th section ‘ the judge shall direct the clerk to issue the notice calling the creditors together,’ etc. By section 9th, ‘ when issuing the order for the meeting of the creditors, the judge *shall order that all proceedings against the debtor be stayed.*’ It is observable that this statute contemplates the double purpose of discharging the debtor and of distributing his assets among his creditors. He is allowed, too, by the statute, a provision out of the property. The court having jurisdiction of this subject, has control over the estate as a portion of the subject of its litigation. The whole property of the bankrupt may be considered as in its custody and within its control. The proceedings, at least in its preliminary stages, is more in the nature of a proceeding *in rem* than *in personam*. No notice of the order staying proceedings was necessary to the sheriff or the creditor to give it effect. The creditor had no right to levy after the granting of the order.”

§ 95. **How Insolvency Proceedings Affect Attachment.**—The present insolvency law would render a slight modification in the foregoing opinion proper, in that the judge is not required to make any order staying proceedings against the debtor. The present law itself stays proceedings. No attachment can be levied after the filing of the petition and schedule in voluntary insolvency, and, whatever property there may have been attached, passes from the hands of the officer to the person designated by the court as its custodian, or to the assignee. The officer should not abandon any property he may have attached belonging to the insolvent, for he would be liable for its loss thereby ; but must keep it until the lawfully designated custodian appears to receive it.

The question as to whether the filing of a petition and schedule in voluntary insolvency by the judgment debtor stays proceedings under execution after a levy has been made, has not been up to this writing, determined in any case before the Supreme Court of this State. The lien of a levy under a writ of attachment would not be divested by insolvency proceedings, but proceedings therein would be stayed ; nor can a sheriff make a levy under the writ of attachment after the debtor has filed his petition.

A creditor may prosecute his suit to a judgment for the purpose of ascertaining the amount due to him, but all other proceedings are stayed, in actions against the debtor. The case of *Tafts v. Manlove*, 14 Cal. 47, settles the point (if any doubt existed) as to the stay of proceedings where a levy has been made under a writ of attachment, and it is sometimes urged that it determines the effect of involuntary proceedings also after a levy has been made under the writ of execution.

But on this subject opinions are divided. The Insolvency act of 1880 follows closely in form the United States Bankruptcy Law, under which a sheriff, having made a levy under execution, could proceed to advertise and sell the property of the debtor, where the levy had been made prior to the filing of the petition in insolvency, and it is the opinion of many members of the bar that our courts will so hold whenever the question shall come up for consideration. It is urged by those who hold this view of the question that where a levy under execution has been made upon a judgment rendered against the debtor, no rights of the other creditors of the insolvent can be injuriously affected by the application of the property levied upon to the satisfaction of the execution creditor's judgment.

Under the Insolvency law his judgment would be a preferred claim, and it would make no difference to the other creditors whether the judgment were satisfied by the sheriff or the assignee. There is also to be considered the rights of the sheriff in the matter. He is entitled to his commissions under the execution, and the right vested from the moment he made the levy.

The judgment creditor, having pursued the property up to a judgment, execution, and levy, should be allowed to realize under the levy and sale, instead of being compelled to await the slow proceedings inseparable from the forms and ceremonies of insolvency.

§ 96. **What Constitutes a Valid Levy.**—In making the seizure, the officer should exhibit as much regard for the position of the defendant as he can consistently with the duty he owes to the law, the creditor's rights, and to himself. He should under no circumstance conduct himself tyrannically toward the

debtor, nor proclaim the debtor's misfortune from the house-top. Yet, to constitute a valid levy, the courts have held that some open, unequivocal act should be done that would lead all persons to know that the property was no longer in the custody of its former owner, but in that of the law. The levy of the attachment should be announced to whoever may be present in charge of the property, and if it is necessary for the safe keeping of the property a keeper should be put in charge thereof. An inventory of the articles seized should be made at the same time.

§ 97. **Property must be taken into Custody.** Under section 542, Code of Civil Procedure, a levy of attachment on personal property capable of manual delivery must be made by taking the property into custody. An officer cannot safely leave property attached in the possession of the defendant. The principle is asserted in *Dutertre v. Driard*, 7 Cal. 549, and *Sanford v. Boring*, 12 *id.* 539, that, if after a levy of a writ of attachment upon personal property, by taking it into possession, the officer permit the defendant in attachment to resume its possession, the levy would be thereby defeated as against execution or attachment, creditors subsequently levying thereon, or against a subsequent purchaser from the defendant in attachment, who, upon such purchase, takes the possession thereof. In the case of *Dutertre v. Driard*, above referred to, the plaintiff recovered a judgment against the defendants on the 1st of May, 1856, and caused an execution to be placed in the hands of the sheriff, who on that day had sufficient property in his hands, consisting of the stock and furniture of the Franklin restaurant, by virtue of a writ of attachment

in the suit, to satisfy the judgment. The same day the plaintiff stipulated with defendants that if they would pay him two hundred and seventy-eight dollars and eighty-two cents on the 5th of May, the execution should be suspended for one month; and then, if \$175 should be paid, a suspension for another month should be given; and so on, from month to month, until all should be paid; but if defendants failed to make their payments, the sheriff should proceed to sell. The property in the meantime to be considered in charge of a mutual friend, as sheriff's keeper, and that officer released from the safe-keeping, and written orders were given the sheriff in conformity with the above. On the 2d of July, 1856, the sheriff returned the execution, its time having expired, and on the 28th of August, an "alias" issued. The monthly payments were punctually paid by the defendants up to the 5th of August, 1856, which stayed the execution until the 5th of September. On the 22d day of August, 1856, the same effects were attached by Baker & Corbinier, for about \$600; on the 26th of August the goods were sold for about \$1400. The sheriff refusing to pay over the money arising from the sale, until the rights of plaintiff, and Baker & Corbinier, were determined, a rule was procured by plaintiff against him to show cause why he should not satisfy his execution against defendants. At the hearing thereof, the court below decided that the plaintiff had lost his priority, and the claim of Baker & Corbinier must first be paid out of the funds arising from the sale. From this order plaintiff appealed, and the supreme court affirmed the judgment.

§ 98. **Attached Property in Custody.**—If a

sheriff attaches personal property consisting of a portable steam threshing engine and accompanying articles used for threshing, by making a memorandum of the property and delivering a copy of the attachment, summons and complaint to the defendant, and then directing verbally a person who is at work one hundred yards from the place where the property lies to look after it, and if anyone meddles with it to tell them it is attached, he has sufficient custody of the property as against persons purchasing it from the defendant with knowledge of the attachment. (*Rogers v. Gilmore*, 51 Cal. 310.) The court said: "The statute requires that the officer should take the property into custody. And it seems by the authorities that what that means is governed somewhat by the situation or relation of the parties making the contest. It is supposed that as against Gilmore himself there was sufficient custody of this property to hold it. Against another attaching creditor there may not have been. Against a purchaser from Gilmore, *in good faith*, there may not have been. But the court is of the opinion that the defendants purchasing from him *with notice of the attachment*, it is a sufficient custody as against them."

§ 99. **Property must be Within View of the Officer.**—The levy to be valid must be made by taking the goods into his custody and under his exclusive control. The articles must be within the power of the officer. He must continue to retain this power over them by remaining present himself, by appointing an agent or keeper in his absence, by taking a receipt for the property, by inventorying them, or by a seasonable removal of them. It is not necessary that they should be removed, but they must, in all cases, be put

out of the control of the debtor. When the attachment is levied, the property must be within the view and subject to the control of the officer.

§ 100. **Attachment Lien Dependent on Possession.**—An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the property is had. (§ 3057, Civil Code.)

§ 101. **Prior Liens must be Satisfied.**—An officer cannot take property belonging to the defendant in the writ, from the possession of a third party who has a lien upon the property, without first satisfying the claims of the lien. “Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by labor or skill employed for the protection, improvement, safe keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service.

Any livery or boarding or feed stable proprietors and persons pasturing horses or stock have a lien dependent on possession for their compensation in caring for, boarding, feeding, or pasturing such horses or stock. A person who makes, alters, or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid.” (§ 3051, 3052, Civil Code.)

§ 102. **Waiver of Warehouseman's Lien.**— When a warehouseman who has goods in charge states to one who is about to take possession of the same, by a legal process, that he has no charges on the goods, this is a waiver of the warehouseman's lien for charges, if any he had. (Blackman v. Pierce 23 Cal. 509.)

§ 103. **Sales Prohibited under Attachment.**— An officer cannot sell property nor allow it to be sold under attachment, except it be perishable property (§ 547, C. C. P.), or by an order of the court as provided in § 548, C. C. P. An officer selling without the notice prescribed by § 692, C. C. P. forfeits \$500 to the aggrieved party, in addition to his actual damages. The law prohibiting sales, except as above noted, is sometimes more honored in the breach than in the observance. The fact that a stock of goods in a store is attached is not always positive evidence that the defendant is insolvent and unable to pay the claim. Where the officer knows the debtor to be solvent, he may be, morally, although not legally, justified in permitting the debtor's business to go on for a brief time, to enable him to settle with the attaching creditor, the officer in the meantime placing a keeper in charge of the goods, with the understanding that all moneys received by sales shall be turned over to the officer.

The application of an attaching creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching creditors, it is the duty of the sheriff to

do so, if he wishes the decision to bind them. (*Dixey v. Pollock*, 8 Cal. 570.)

A sheriff who receives an attachment, regular upon its face, cannot pay over the money obtained by him from the sale of the property, levied on by virtue of the writ, to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue. When a sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. The sheriff has no right to go back of the process and raise the question as to the validity of the attachments. (*McComb v. Reed*, 28 Cal. 281.)

If two attachments, issued from different district courts, are placed in the sheriff's hands, and one is issued and levied before the other, and the sheriff levies on personal property by virtue of both, although the court from which the second attachment issued may make an order for the sale of the property, it has no power to dispose of the fund arising from the sale, other than the surplus remaining after the claim of the first attaching creditor is satisfied. (*Weaver v. Wood*, 49 Cal. 297.)

If two attachments, issued out of different courts, at different times, are placed in a sheriff's hands, and both are levied on the same personal property, and the court out of which the latest attachment issues orders the property sold, and the proceeds deposited with its clerk, and the sheriff obeys, and the money is paid to the second attaching creditor, the sheriff is liable to the first attaching creditor for the amount for which he recovers judgment, or for the amount of the proceeds, if less than the amount of the judgment. *Id.*

§ 104. **Keeper's Fees.**—In keeping property under process, the same prudence and economy should be exercised as in the ordinary business affairs of life. No unnecessary expense should be incurred therein. Where the fee bill of the county provides that the costs of the officer shall be allowed by the court, a statement of the costs should be submitted to the court for approval before the return is made upon the writ.

§ 105. **Removal of Attached Property.**—When goods are attached in a store, dwelling, hotel, or other establishment, and the defendant shows no inclination to procure a release of the attachment, or, on the contrary, desires the property removed, and that no keeper be left upon his premises, the wishes of the owner should be complied with as soon as practicable. How soon, must depend upon the circumstances of the case. For while it is not only the right but the duty of the officer to seize the creditor's property, yet the creditor's house is his castle, and the officer by remaining therein, or by leaving his keeper therein, an unreasonable length of time, becomes a trespasser and may be ejected therefrom. He is not bound to remove the goods in the night time, when the levy has been made at too late an hour of that day to enable him to take them away with safety.

§ 106. **Retaking Goods from Officer.**—Every person who wilfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is (according to § 102 of the Penal Code) guilty of a misdemeanor.

§ 107. **Penalty for Obstructing Officer.**—Every person who wilfully resists, delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding \$5000, and imprisonment in the county jail not exceeding five years. (§ 148, Penal Code.)

§ 108. **Excessive Levy.**—If there is sufficient property in the defendant's possession to satisfy the claim of the attaching creditor, with costs, he will be liable to the latter if he does not levy upon sufficient goods to satisfy the judgment. If, on the other hand, he make an excessive levy, he is liable to the defendant in the action. Where there is great uncertainty at the time of the levy as to the value of the property attached, and it is subsequently ascertained that its value is greatly in excess of the demand sued for, it does not follow that the levy was therefore excessive. It is the duty of the officer to seize sufficient property to satisfy the amount specified in the writ—that is to say, property which would be sufficient, in his judgment, when sold at public auction. There are times when from the situation of the property, and other circumstances, there must be great uncertainty as to its value, and because it may turn out afterwards that the value of the property is much greater than the demand, it does not follow that the levy was therefore excessive. (*Sexey v. Adkison*, 40 Cal. 408.)

§ 109. **Surplus Property to Return to Defendant.**—When the lien of an attachment is satisfied, the property not disposed of in satisfaction of the lien, as well as the surplus moneys that may remain after

the sheriff's sale and satisfaction of the debt, remain subject to the rights of the judgment debtor or his assignee. (*Sexey v. Adkison*, 40 Cal. 408.)

§ 110. Sheriff Liable for Loss by Negligence.

A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. One Sanford sued Boring, the sheriff of Nevada county, (12 Cal. 539) for a failure to make a levy and sale of property—previously attached in the same suit—under an execution issued upon a judgment in favor of plaintiff and against Pultney & Armstrong. When the sheriff took the property under the writ of attachment, he did not remove it, but left it all in the stable where it was attached, and in the possession of Armstrong, one of the (then) defendants, who continued in possession, and conducted the business as he had done before. The sheriff did not make the money. On the trial, the defendant offered to prove that plaintiff verbally directed the defendant to put Armstrong in possession of the property attached at the suit of Sanford, as keeper. This evidence was objected to, upon the ground that the statute required such instructions to be in writing. The sheriff lost the case. He had levied the attachment upon sufficient property to satisfy the debt, and he failed to make the money under the execution. The levy of the attachment placed the property in his hands to abide the judgment and execution, and this property was the plaintiff's security for his debt. If the sheriff

wasted or lost it, or suffered it to be diverted to some other purpose, he is liable. He had no right to suffer the property to go out of his possession, except in due course of law, and became responsible when he did so. His excuse that he was verbally directed by Sanford to put Armstrong in possession as keeper could not avail him. The statute is express, that no direction or authority by a party or his attorney to a sheriff in respect to the execution of process, or the return thereof, or to any act in relation thereto, shall be available to discharge or excuse the sheriff for a liability for neglect or misconduct unless it be contained in writing. The evident meaning of this language embraces all acts done by the sheriff in respect to the execution of process, including, of course, the care and disposition of the property levied on.

§ 111. **Authority to Conduct Business under Attachment.**—An attorney has no authority, by virtue of his employment as such, to instruct a sheriff to conduct a business, such as a restaurant, upon which an attachment has been levied, and thereby bind his client for the expenses incurred. This is laid down as the law in this state, in *Alexander v. Denaveaux*, 53 Cal. 663, and is in accordance with § 283 of the Code of Civil Procedure, which, in subdivision 1, defines the authority of an attorney: "To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, *and not otherwise.*" There are decisions to the contrary in other states, but they are probably based upon less stringent laws relating to clientage.

In the case above referred to, the sheriff attached a restaurant, kept it open and conducted the business

for awhile, under the instructions of the plaintiff's attorney. The sheriff sued the plaintiff for the expenses incurred, and the Supreme Court, on appeal, said: "The plaintiff alleges in substance that he, at a certain time, was sheriff of Los Angeles county and that while he was such sheriff the defendants delivered to him an attachment which they had sued out against the proprietors of a restaurant, which he attached and took into his possession, and that thereafter the defendants "duly gave plaintiff, as sheriff as aforesaid, instructions in writing to keep the said restaurant open while holding the same under said writ, and pursuant to said request and instructions plaintiff did keep the same open, and at the request of said Denaveaux and Maison (the defendants) plaintiff did, between the 25th day of July and the 16th day of October, 1877, render service and incur expense for the defendants herein and about the levy of said writ as aforesaid, the preservation of land, property, keepers' fees and cost of storage, to the amount and of the value of \$1,272.73."

On the trial it was not shown that the defendants ever gave the plaintiff any instructions in writing or otherwise to keep said restaurant open for any period.

But it was shown against the objection of defendants that defendants' attorneys did so instruct the plaintiff in writing, which was introduced in evidence by the plaintiff "for the purpose only of showing that Denaveaux and Maison (the defendants) had notice that the property had been attached and that the sheriff had it in his custody at the place where it had been attached, and not for the purpose of showing anything in regard to running of restaurant, and attorneys for plaintiff expressly disclaimed any intention to demand any amount or charge for running the restaurant."

To the ruling of the court upon their objection to the introduction of this testimony the defendants excepted. There are cases in which testimony may be introduced for one purpose which is inadmissible for any other, and the court in such cases may properly admit it for that purpose, and limit it at the request of the opposing party to that purpose only. But this testimony had a tendency to prove one of the allegations of the complaint which was denied by the answer, to wit: That the defendants instructed the plaintiff in writing to keep the restaurant open, and it was wholly irrelevant and immaterial for any other purpose. The Code does not require that the sheriff shall give an attaching creditor notice of the levy of his attachment, and it was wholly unnecessary in this action to prove that the defendants had notice that theirs had been levied upon said restaurant. If the levy was properly made the plaintiff was entitled to his legal fees, and the defendants were bound to pay them.

And although the learned judge who tried the case admitted this testimony for the single object which he at the time stated, it appears from the first instruction which he gave to the jury that he subsequently lost sight of that object. For he instructed them as follows: "If you find from the evidence that the plaintiff rendered the services and incurred the expenses and indebtedness sued for, for Denaveaux and Maison in their suit against Caison and Schmidt, and at the request of the attorneys for said Denaveaux and Maison, then you must find for the plaintiff."

Here we have first an allegation that the plaintiff while holding said restaurant under said attachment kept the same open by written instructions of the defendants; second, a writing introduced in evidence

which shows that the defendant's attorneys instructed the plaintiff to keep it open, and, third, an instruction to the effect that if the plaintiff rendered the services and incurred the indebtedness sued for, at the request of the attorneys of the defendants the verdict must be for the plaintiff.

When this case was here before, the court said: "The plaintiff here, as sheriff, certainly had no authority because of the writ of attachment in his hands, to keep the restaurant open for customers, or to conduct business therein. His authority, if any, came from the instructions of the attorneys of the plaintiffs in the attachment suit. But those attorneys had themselves no authority to give such instructions, or to thereby bind their clients, the defendants here, to pay for expenses incurred by the sheriff in conducting the business. The circumstances under which an attorney has authority to bind his client are pointed out in the Code of Civil Procedure, § 283, and the facts of this case do not bring it within that section. (53 Cal. 664.)

"It seems to us that this makes the errors of the court, in admitting the written directions of the defendant's attorneys in evidence, and in giving the instruction above quoted, manifest.

"Judgment and order denying motion for a new trial reversed.

SHARPSTEIN, J.

I concur:

MYRICK, J.

CONCURRING OPINION.

"I concur in the above. The attorneys for plaintiff having disclaimed any intention to demand any amount

or charge for recovering the restaurant, was equivalent to withdrawing any claim for it, and the instructions of the court contravening this disclaimer were erroneous.

THORNTON, J."

§ 112. **Authority of Deputy.**—A deputy sheriff who seizes property under an attachment, is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. (*Krum v. King*, 12 Cal. 412.)

§ 113. **Partnership Property.**—A sheriff, under an attachment, must take possession of the personal property upon which he levies. Being authorized to seize the interest of one of several part owners in a chattel, he must take the sole possession of it, in order that it may be forthcoming at the day of sale. If a sheriff has a writ of attachment against one member of a partnership, he must attach the interest of that partner in the partnership effects, and in order to do so may take possession of the entire property. (See also § 202.)

Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, and attachment on his interest in the corporation. In such a case the corporation is no longer privy to the interest of the mortgagor, which is a mere equity in the hands of the mortgagee. (*Edwards v. Beugnot*, 7 Cal. 159.)

§ 114. **Attachment of Stocks.**—The rights or

shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution. So with all debts due the defendant, and all other property in this State of such defendant, not exempt from execution. (See § 541, C. C. P.)

§ 115. **Stocks Attached by Garnishment.**—Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ. (§ 542, C. C. P.)

Stock issued by corporations formed under our statute is only personal property, and no transfer of the same is good against third parties, unless the transfer be made upon the books of the company. (*Weston v. B. R. & A. W. & M. Co.*, 5 Cal. 193.)

§ 116. **Property not Capable of Manual Delivery.**—Debts and credits, and other personal property not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ. (§ 542, C. C. P.) This method of attachment is what is generally termed the

garnishment. When served upon a corporation, the notice should be directed to the corporation by its full name. Upon serving the same, the officer must request the person to whom it is delivered to make a statement in response to the garnishment. It is a custom with officers to deliver with the notice of garnishment a printed blank for an answer, or statement. The service of garnishment should be promptly performed, the nature of the kind of personal property thus attachable being easily and quickly transferable.

§ 117. **Attachable Interest of Lessee in Leased Property.**—A contract by which A. lets B. have a flock of sheep which he owns, and of which he is to retain the ownership, to keep for three years, and by which B. is to deliver to A. the wool sheared from the sheep, and A. is to sell it and pay B. one-half the proceeds, and by which B. is to deliver to A., at the end of the term, the sheep, and A. is then to divide with B. the increase, giving B. one-half the increase as compensation for his services, does not give B. such an interest in the sheep or increase as will support a seizure of them under an attachment against the property of B. The interest of B. in the sheep must be reached by his creditors under a different proceeding. (*Tuohy v. Wingfield*, 51 Cal. 319.) The proper procedure would have been by garnishment on the owner of the sheep.

§ 118. **Mode of Attaching Goods in the Hands of Third Parties.**—Under the provisions of §§ 542, 544, 545 and 688, Code Civil Procedure, it is provided, that whilst the interest of a pledgor of property

is subject to execution, and may be reached in the hands of the pledgee when a third party, yet this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge. (*Treadwell v. Davis*, 34 Cal. 601.)

§ 119. **Pledge of Goods—Rights of Pledge.**—In the case of *Treadwell v. Davis*, sheriff, 34 Cal. 601, plaintiff and one Templeton were severally creditors of Thompson. Templeton, as security for his debt, held in pledge Thompson's goods, of greater value than the sum of both plaintiff's and Templeton's debts. By an arrangement between them, plaintiff guaranteed to Templeton the payment of his debt, and received from him an assignment and the possession of said goods, in pledge to secure the payment of the debts of both plaintiff and Templeton. Thompson, who was not a party to this arrangement between plaintiff and Templeton, afterwards expressed himself gratified at its consummation. Thereafter defendant, as sheriff of the city and county of San Francisco, levied upon and took said goods from plaintiff's possession, under a lawful writ of attachment against the property of Thompson, issued out in the suit of *Martin v. Thompson*, whereupon plaintiff brought this action against defendant for said seizure, and to recover the full value of said goods. *Held*, first, that Templeton lost his lien on the goods, as pledgee, by surrendering them to plaintiff and taking said guaranty for his debt; second, that by said arrangement between Templeton and plaintiff, and the subsequent assent thereto by Thompson, plaintiff acquired, as pledgee, a valid lien on said goods to secure the payment of both said debts; and third, that plaintiff

is entitled to recover in this action, and his right of recovery is not limited to his interest only, as pledgee of the goods, but extends to the whole value of the goods.

§ 120. **The Garnishment.**—Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ and a notice that such credits, or other property, or debts, as the case may be, are attached, in pursuance of such writ. (§ 543, C. C. P.) In serving a garnishment, and where the person so served refuses to give to the officer the required statement or memorandum of the debt or of his having the credit, it is proper to inform him that the law (§ 546, C. C. P.) provides that the party refusing to give the memorandum may be required to pay the costs of any proceeding taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

§ 121. **Notice to Garnishee.**—To render the process of attachment effectual against a corporation, as garnishee, the writ and notice must be served on the president, or other head of the same, or the secretary, cashier, or other managing agent thereof. In the case of a banking corporation, service of process on the teller, whose only duty is to receive and pay out all moneys which come into and go out of the bank, is not sufficient to bind the corporation. (*Kennedy v. Hibernia Savings and Loan Society*, 38 Cal. 151.)

A savings bank cannot avoid its liability to pay over the money of its depositor, on a garnishment at the suit of depositor's creditor, on the ground that its by-laws, assented to by the depositor, makes his pass-book, in which his account is kept, transferrable to order, (*Witte v. Vincent*, 43 Cal. 325.) for such pass-book is not a negotiable instrument in a commercial sense, nor can the agreement of the parties make it so.

§ 122. **Examination of Garnishee.**—A defendant in an action, against whom a writ of attachment has been issued, cannot be compelled to attend before the judge or a referee, and submit to an examination as to the condition and situation of his property, nor can he be compelled to deliver up his property. (*Ex parte Rickleton*, 51 Cal. 316.) The court held that the only supposed authority for such a step, § 545 of the Code of Civil Procedure, is confined to proceedings against persons owing debts to the defendant, or having possession of credits or other personal property belonging to the defendant. It is in that section provided in terms that such persons may be required to submit to examination touching such debts or such property, and the order to be made, or which may be made, as the result of such an examination, manifestly refers to the disposition of property not in the hands or under the personal control of the defendant, but in the possession or under the control of the garnishee. "The provision in that section," say the court, "to the effect that the defendant may also be required to attend for the purpose of giving information respecting his property, does not look to the entry of an order directing him to surrender property in his own possession, but merely to give such information, under

oath or otherwise, as will facilitate the examination of a garnishee under examination."

When the garnishee denies that he is indebted to the judgment debtor, neither the referee nor the court has power to compel him to pay to the sheriff the amount of his alleged indebtedness, but the court may enter an order authorizing the judgment creditor to institute an action against the garnishee to determine the question of indebtedness. (*Hartman v. Olvera*, 51 Cal. 501.)

§ 123. **Garnishment of Sum Due for Homestead.**—If the wife declares a homestead on common property, and the husband procures a policy of insurance on the house thereon, and the house is destroyed by fire, the sum due from the insurance company is not subject to garnishment by a judgment creditor of the husband. (*Houghton v. Lee*, 50 Cal. 101.)

§ 124. **Liability of Garnishee.**—A garnishee can only be required to answer as to his liability, to the debtor defendant, at the time of the service of the garnishment. (*Norris v. Burgoyne*, 4 Cal. 439.)

§ 125. **When Garnishment is not a Lien.**—Service of a copy of the writ and notice of garnishment upon a third party, constitutes no lien on property of the defendant in the hands of the third party, capable of manual delivery. The Code provides one distinct method of levying upon personal property capable of manual delivery, and another equally distinct method of levying upon personal property not capable of manual delivery. That there are

different ways pointed out to the officer by the law, in one or the other of which he must act, according to the nature of the property he is about to seize, should not be lost sight of. The writ affects property only from the time of the levy. A case in point, as illustrating the danger incurred by an officer in not observing the distinction here pointed out, is that of *Johnson v. Gorham*, 6 Cal. 210, wherein the court said: "From the statement, it appears that plaintiff, having recovered in the superior court a judgment against one Dockham, took out an execution and placed it in the hands of defendant, who was sheriff of San Francisco, with instructions to levy on and sell certain personal property, which was done, and a sufficient sum of money received to satisfy the plaintiff's judgment; that after the return day of said execution, he demanded of defendant the amount due on his execution, and that defendant refused to pay the same."

The defendant, after admitting the facts as above, alleges that, prior to the issuing of plaintiff's execution, one Bean had caused execution to issue against the same defendant, which was served on one Libley, with notice that all the property and effects in his hands, belonging to defendant in execution, were attached; that the property sold under plaintiff's execution was, at the time of said service, in the hands of Libley, and that the proceeds of the sale were claimed by Bean under his execution. He therefore asks that the court will determine the party entitled to receive the money. The court rendered judgment for the amount collected, with twenty-five per cent. damages, and ten per cent. per month interest from the date of the demand.

Under our statute, an execution affects property only from the time of levy. Plaintiff's execution having been first levied, should be first satisfied, notwithstanding there may be another and an older execution against the same defendant in the hands of the sheriff. The service of a copy of execution and notice of garnishment upon a third party constitutes no lien on property of the debtor in his hands, capable of manual delivery. It is clear, therefore, that plaintiff was entitled to recover from the sheriff so much of the proceeds of the sale as was sufficient to satisfy his judgment.

The court, however, erred in giving judgment for damages. In *Egery v. Buchanan*, 5 Cal. 53, this court held that "statute penalties are only recoverable when, by the return of the sheriff, he admits the collection of the money and refuses to pay it over. If it were otherwise, an error of judgment, or even a hesitation to decide between adverse claimants, might work the ruin of an honest and conscientious officer."

In this case the officer appears to have acted in good faith, and his failure to pay over the money on the request of plaintiff arose from his inability to decide between the conflicting claims of plaintiff and Bean.

§ 126. **Sale of Perishable Property.**— If an officer attach any property that is perishable, he need not wait for a judgment, nor need he apply for an order of court to sell it. He is required by § 547, C. C. P., to sell such property in the manner in which personal property is sold under execution. Notices of the time and place of sale should be posted in three public places of the township, or city (as the case may

be), where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment, recovered previous to the issuing of the attachment.

§ 127. **Sheriff's Receipt a Discharge.**—Debts and credits due to a defendant, when attached, may be collected by the sheriff, if the same can be done without suit; and the sheriff's receipt is a sufficient discharge for the amount paid. (§ 547, C. C. P.) When collected, they must be held to answer the judgment.

§ 128. **Sales by Order of Court.**—Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action. (§ 548, C. C. P.) All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. (§ 694, C. C. P.) Sales by order of the court must be made by posting written notice in three public places in the township or city where the sale is to take place, for not less than five nor more

than ten days, except where the time of sale is fixed in the order of the court.

§ 129. **Fraudulent Transfers.**—One of the most difficult obstacles encountered by officers in holding property belonging to the judgment debtor in executions, arises from the facility with which transfers may be made of personal property. As if in contemplation of fraudulent intention on the part of vendors who are, or are about to become, insolvent, the legislature has hedged such sales around with strongly expressed provisions in favor of the creditor who is in pursuit of his claim. § 3440 of the Civil Code declares that “Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer.”

There are numerous instances of record in which courts have been called upon to make a practical application of the principle that a vendee of personal property must assume at once all external *indicia* of title, in order to protect himself against the creditors

of the vendor. In this State the statute stands upon the extremest rule of caution and promptitude. The sale must be "accompanied by an immediate delivery, and be followed by an actual and continued change of possession." (See §§ 3439, 3440, 3442, Civil Code.) The statute makes certain facts conclusive evidence of fraud, and whatever may or may not be the actual intention of the parties, if the actual facts exist which are contemplated by the law, the sale is void. The language of the statute is exceedingly strong, and the intention manifest. The change of possession from the vendor to the vendee must not only be actual but also continued. The object of the statute being the prevention of fraudulent sales of goods, no means more simple and efficient could have been adopted to have accomplished the end intended, than that requiring this actual and continued change of possession. It takes away from the parties the means of carrying out their fraudulent intent, and removes the temptation. As the fraudulent vendor cannot remain in possession, under any pretense whatever, he is compelled to trust entirely to the fidelity of the fraudulent vendee.

To constitute a valid sale of personal property against creditors, there must, according to the provisions of the statute of this State, be "an immediate delivery thereof, accompanied with an actual and continuous change of possession." By an immediate delivery is not meant a delivery *instanter*; but the character of the property sold, its situation, and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirement of the statute; and this will often be a question of fact for the jury. (*Samuels v. Gorham*, 5 Cal. 236.)

Where the purchasers from a common vendor are equally innocent, or equally in fault, the first purchaser is entitled to the goods. The question of delivery and change of possession is a mixed question of law and fact; but as to what shall constitute a delivery, is a question of law alone. The question of the intention of the parties should not be submitted to the jury. Where H., the owner of barley, which he has piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked "V," and piled up in another part of the corral, and employs a third person to take care of the same for him, and H. afterwards sells and delivers the same to B.: *Held*, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. (Vance v. Boynton, 8 Cal. 554.)

A delivery of a warehouse receipt, stating that the goods named therein are deliverable on return of the receipt, is sufficient *prima facie* to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. When the defendants show that the person to whom, in his own name, the receipt was given, and who passed it to plaintiff, was their agent or broker, acting for them, but permitted to keep it on storage in his own name, they do not rebut the *prima facie* case made out by the plaintiffs, by the possession of the receipt. (Horr v. Barker, 8 Cal. 610.)

Where the owner of a certain number of barrels of flour, on storage in a warehouse, sold them all to different purchasers, giving them orders on the warehouseman, which was given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on

his books charging the vendor, and crediting the purchasers with their respective lots: *Held*, that there was a sufficient delivery of possession without a separation of the various lots.

Where a vendor only sells a part of goods on storage, those sold, if all together and of the same mark, must be separated from the larger mass, in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt, and entry of the transaction on the books of the warehouseman. (*Horr v. Barker*, 8 Cal. 603.)

Where A. had a large quantity of flour stored in the warehouse of B., and sold a portion of it to C., and gave an order for the flour sold on B., who accepted the same and gave C. in exchange a receipt for the same, and transferred it on his warehouse books to the account of C., but did not separate any specific portion from the flour of A., as the property of B., and the whole was subsequently seized in an action against A.: *Held*, that the sheriff was not liable to C., in the absence of segregation of the flour, but that B. was estopped by his receipt from denying his liability. (*Adams v. Gorham*, 6 Cal. 75.) This action being for the recovery of specific property, it was necessary to show, as against the sheriff, that the portion claimed by the plaintiffs had been severed and designated from the bulk out of which it was sold. Otherwise there is no mode of identification.

Where the owner of goods made a *bona fide* sale of them to a purchaser, and delivered possession of them to him, and the purchaser, immediately after, appointed the former owner of them his agent, to take charge

of them and sell them, and, for that purpose, re-delivered the possession of them to him: *Held*, that the sale was fraudulent and void, as against the creditors of the original owner. (*Fitzgerald v. Gorham*, 4 Cal. 289.)

A bill of sale of "all the goods and merchandise and property we own, have, or have an interest in, in a store in Nevada, county of Nevada, formerly occupied by Bailey Gatzert, and now in possession of the sheriff of Nevada county, said goods forwarded by us to Bailey Gatzert, Nevada," is held by the supreme court to contain a sufficient description of the goods.

The plaintiffs purchased from B. a certain number of cattle, and presented to C., the agent of B., an order for their delivery. C. pointed out the cattle to one of the plaintiffs as they were grazing in view, and told him that he delivered him possession, and then accepted an offer of employment from the plaintiffs, and remained in charge of the cattle until they were seized by the defendant: *Held*, that this was a delivery as immediate and as complete as the nature of the case would admit, and followed by an actual and continued change of possession. (*Montgomery v. Hunt*, 5 Cal. 372.)

In *Engles v. Marshall, et al.* (19 Cal. 334), the supreme court affirms a former decision concerning change of possession of personal property, as follows: "In *Stevens v. Irwin* (15 Cal. 506), we said: 'Delivery must be made of the property; the vendee must take the *actual* possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of

the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely when it is *bona fide* and openly taken, and it is kept for such a length of time as to give general advertisement of the *status* of the property and the claim to it by the vendee.’”

The change of the property sold must be continued. The statute does not fix any limits when this change may cease; and if courts would put limits to it, they could do away with the clear language of the law. (Bacon v. Scannell, 9 Cal. 272.)

Where the plaintiff bought eight hundred sacks of flour, on storage in a warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterwards attached as the property of the vendor: *Held*, that the delivery was sufficient and the sale valid. It was not necessary for the vendee to remove the property from the house where it was at the time of the purchase, to bring himself within the statute. (Bacon v. Scannell, 7 Cal. 275.)

In an action against a sheriff, to recover the value of a stock of goods taken under attachment and claimed by a third person, testimony showing a fraudulent design is admissible under the allegations of an answer charging that the sale was made to defraud creditors, although the testimony does not connect the purchaser with the fraud, or show that he was cog-

nizant of such fraudulent design. Such testimony would not of itself vitiate the sale to an innocent purchaser without notice and for a valuable consideration; but the fraudulent intent of the vendor being established, the jury must determine from the circumstances of the case, whether the purchaser participated in the fraud. Evidence that the judgment debtor had attempted to make fraudulent conveyances of his property to others was held both by the lower court and by the supreme court (*Landecker v. Houghtalings*, 7 Cal. 391,) to be admissible.

Where the plaintiff took a mortgage upon one thousand sacks of flour, and took the warehouseman's receipt therefor, and subsequently requested the warehouseman to segregate the particular flour from a large quantity belonging to the mortgagor, and the warehouseman accordingly put plaintiff's mark on a pile of eleven hundred and ninety-six sacks of the mortgagor, standing separate from the rest: *Held*, that it was a good segregation. This delivery destroyed the privity between the warehouseman and the mortgagor, and made the former agent of the mortgagee alone, with whom he might adjust for the excess.

Where the sheriff wrongfully took possession of the goods, and thereby deprived the plaintiff of them, the fact that they were taken by the coroner, under a writ against the sheriff, before the latter had removed them, does not excuse his tort. (*Squires v. Payne*, 6 Cal. 654.)

If a vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, and the party holding the goods consents to retain the goods for him, and does so retain them, it is a sufficient delivery and change of possession to satisfy the re-

quirements of § 3440 of the Civil Code. (*Williams v. Lerch*, 56 Cal. 330.)

The purchaser or mortgagee of a kiln of bricks, while being burned, must take that possession of the property which places him in the relation to the same that owners usually have to a like kind of property, in order to secure it against attaching creditors of the vendor. (*Woods v. Bugbey*, 29 Cal. 467.) If the owner of a kiln of bricks, before the burning of the same has been completed, makes a sale thereof in good faith, and for a valid consideration, to a creditor, and the vendor completes the burning of the kiln, exercising the same apparent control as before, the sale is to be deemed fraudulent as to an attaching creditor for want of a change of possession.

If a sale of property is made which is fraudulent as to creditors of the vendor, and the vendee then sells to a third person, in whose hands the goods are attached by a creditor of the first vendor, and the creditor, in an action against the sheriff, attacks the sale as a fraud on creditors, this admits the validity of the sales as between the vendors and vendees, and the creditor must show that the second vendee was a party to the fraud. The burden of proving the fraud is on him; and the questions whether the second vendee had notice of the fraud of the first sale, or was an innocent purchaser, or whether the second vendee paid a valuable consideration, have no application to the case. Such questions apply only to a case where property is purchased by such fraudulent representations as will vitiate the sale between the vendor and vendee. (*Thornton v. Hook*, 36 Cal. 223.)

A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors as ware-

housemen at a regular charge, and their receipt given for the goods on storage, the vendors doing business as commission merchants, and sometimes receiving goods on storage, is void as to the creditors of the vendors. (*Stewart v. Scannell*, 8 Cal. 81.) *Idem.*—Change of possession requisite.—The absence of any fraudulent intent will not take the case out of the statute. There must be an actual and continued change of possession, or the sale is void as to creditors.

A sale of personal property, to be valid against creditors, must be accompanied by an actual and continued change of possession. (*Whitney v. Stark*, 8 Cal. 514.)

A sale of personal property, unaccompanied by immediate delivery, is void as to creditors, and this, though delivery be made before levy is made by the creditors. (*Chenery v. Palmer*, 6 Cal. 119.)

In an action brought by a vendee of personal property against a sheriff, to recover possession of the same, where the sheriff claims the property under an execution in favor of a creditor of the vendor, and attacks the sale for fraud, if the testimony is conflicting as to whether there was an actual and continued change of possession in the plaintiff after the sale to him, this question should be submitted to the jury. If, however, the facts are undisputed, it is a question of law whether these facts constitute a continued and exclusive possession in the vendee. (*Hodgkins v. Hook*, 23 Cal. 581.)

Where, after a sale of personal property, the creditors of the vendor attack the same for fraud, and, on the trial, there is evidence that the vendee, after the sale and delivery, exercised some slight acts of owner-

ship and control over the property, but this is not shown to have been done with the knowledge or consent of the vendor, the fact that the vendor does not offer any evidence explanatory of the vendee's acts, does not add anything to the weight of the evidence touching the vendee's connection with the property.

One Strauss, a clothing merchant, whose goods were under attachment, sold them to Weil, who procured the release of the attachment, and removed the stock to his (Weil's) cigar store. Within less than two weeks thereafter, Strauss was engaged professedly as employee of Weil in peddling out the goods and managing their sale at retail, in which condition they were again attached as the property of Strauss: *Held*, that there was no such actual and continued change of possession as was required by the fifteenth section of the Statute of Frauds, and that the goods were therefore liable to the attachment. (Weil v. Paul, 22 Cal. 493.)

In an action against a sheriff for taking goods from the possession of the plaintiff where the defendant justifies under a writ of attachment against a third person, and alleges a fraudulent sale from such third person to the plaintiff, proof of the debt on which the writ of attachment was based is necessary for no other purpose than as the foundation for proof that the sale was void as to creditors. (Mamlock v. White, 20 Cal. 598.)

Where a vendee of personal property buys it *bona fide*, takes possession openly, and holds it in exclusive possession for a year or more, and afterwards puts the property into the possession of the vendor, as attorney in fact of the vendee, this qualified possession

of the vendor does not, as matter of law, show the sale to be fraudulent and void as against the creditors of the vendor. (*Stevens v. Irwin*, sheriff, 15 Cal. 503.)

Every sale of property and personal chattels is good between the parties, and cannot be attacked for fraud, except by a creditor who has recovered judgment and taken out execution against the vendor, which has been returned unsatisfied, in whole or in part—with the single statutory exception of an attaching creditor, and his remedy being unknown to the common law, he must show affirmatively that his attachment has been properly issued under the statute, before he can attack the sale. (*Thornburg v. Hand*, 7 Cal. 537.)

Hay cut on land in possession of B. lies in three fields, or about one hundred and fifty acres, in swaths, cocks, winrows, and stacks. Plaintiffs mowed it, and boarded with B. B. mortgages the hay to plaintiffs for work, and they cease to board with B., whose dwelling is separated from these fields by a fence. Plaintiffs proceed to gather and stack the hay, until the levy of an execution on it, eight days afterwards, by defendant as B.'s property: *Held*, that, even conceding removal from the premises to be essential to a complete delivery of the hay, still, plaintiffs were entitled to reasonable time to do it, and that the court erred in assuming as matter of law that eight days was too long. (*Chaffin v. Doub*, 14 Cal. 384.)

The statute of frauds of this State enacts that "no mortgage of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged premises be delivered to and retained by the mortgagee." A mortgage stipulating for the enjoyment of the possession of personal property by the mortgagors until breach of the

condition, is invalid under the seventeenth section of our statute of frauds, as to all persons except the parties to it. Under such a mortgage the mortgagee cannot claim the right of possession as against a sheriff who has attached the property as that of the mortgagors. (Morgan v. Lowe, 5 Cal. 329.)

When property which has been sold is afterwards levied upon and sold under an execution by a creditor of the vendor, and suit is brought by the vendee to recover damages for the alleged wrongful taking, and the defence is, that the sale was made to defraud creditors, and that there was no immediate delivery or continuous change of possession, the statements of the vendor, whether made before or after the sale, are competent evidence to prove the fraud as against him. Whether the statements of the vendor are evidence against the vendee, depends on circumstances. If made before the sale is completed, they are evidence against the vendee. (Gallagher v. Williamson, 23 Cal. 332.)

§ 130. **Officer's Right to Indemnity.**—When an attachment or execution is placed in the hands of an officer to be executed, he may demand indemnity of the plaintiff in the execution before he can be required to seize property in possession of third parties claiming to be the owners, and if the plaintiff, upon demand, fails to indemnify the officer, and he, thereupon, returns the writ *nulla bona*, an action for false return cannot be maintained, even if it should turn out that the goods so found in the hands of strangers claiming to own them, were the goods of the defendant in the writ. This declaration appears in the opinion of the court in the case of Long v. Neville, 36 Cal. 459, but

it is qualified by the further statement that, "Where statutes exist providing for calling a sheriff's jury preliminary to demanding indemnity, it may be necessary to call a jury before demanding the indemnity, unless the calling of a jury be waived." An officer called upon to serve a precept, either by attaching property or arresting the person, if there be any reasonable grounds to doubt his authority to act in the particular case, has a right to ask for an indemnity.

He is not obliged to serve process in civil actions at his own peril, when the plaintiff in the suit is present, and may take the responsibility upon himself.

The risk he is required to run is not for himself, but for the benefit of the attaching creditor. If the goods, moreover, as the creditor alleges, are the property of his debtor beyond dispute, he, the creditor, cannot be injured by giving the indemnity, and if they are not, it is right that he who, for his own supposed advantage, insists on the seizure, should take the consequences of the act.

§ 131. **Trial by Sheriff's Jury.**—Before calling a jury to try the rights of property, the officer should notify the plaintiff or his attorney of the claim and of his intention to summon a jury, so that he may, if he wish, waive the calling of the jury and elect to give to the officer an indemnity bond against the claim. If the plaintiff waive a trial by jury, and give the bond with sureties satisfactory to the officer, it is the duty of the latter to go on and make the judgment. The officer then becomes the agent of the plaintiff, and must depend upon him and the sureties for protection against any suit the claimant may bring against him, by reason of the seizure and sale of the property.

§ 132. **Sheriff as Agent.**—When the sheriff attaches property of the defendant, he does it as the officer of the law. If it is not the property of the defendant, he is the agent of the attaching creditor. (Davidson *v.* Dallas, 8 Cal. 227.)

§ 133. **Sheriff's Jury no Protection.**—The trial of right of property by a sheriff's jury determines and fixes the right of no one, except the right of the officer to demand indemnity, and doubtless was intended for that purpose. If their verdict be against the claimant, he may yet bring his action for trespass or replevin.

If it should be against the plaintiff in attachment or execution, and he indemnify the officer, then the officer is bound to hold the goods, and the claimant must bring his action or lose his rights. If the plaintiff give the bond of indemnity, it will only inure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned.

The verdict of a sheriff's jury is no protection to the officer in a suit brought against him: and it is held (in Perkins *v.* Thornburg, 10 Cal. 191; and Sheldon *v.* Loomis, 28 Cal. 123) that such a verdict is not admissible in evidence as a defense. When an officer has reason to believe that property seized under attachment or execution belongs to a stranger to the writ, he should for his own protection and in the interests of all others concerned, inquire into the ownership thereof.

§ 134. **Summoning Sheriff's Jury.**—If any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim, and such pro-

ceedings shall be had thereon, with the like effect, as in case of a claim after levy upon execution. (§ 549, C. C. P.) He may go upon the street, or anywhere in the county, and orally summon persons qualified as jurors. He must give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and witnesses must be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor, within a reasonable time, give him a sufficient indemnity for proceeding. The fees of the jury, the sheriff, and the witnesses must be paid by the claimant, if the verdict be against him; otherwise, by the plaintiff. Each party must deposit with the sheriff, before the trial, the amount of his fees and the fees of the jury, and the sheriff must pay the same to the prevailing party.

Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any sheriff, constable, or policeman, from the persons competent to serve as jurors, resident of the county, or city and county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required. (§ 235, C. C. P.)

§ 135. **Joint Trespassers.**—Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equalling his judgment; and afterwards, the party claiming the property, obtained judg-

ment against the sheriff for the value of the property: *Held*, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. In such case, the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. The sheriff was the separate agent of both attaching creditors, but in the order stated, and as he disposed of the property to the benefit of the first alone, he must look to him, and not the second attaching creditor. (*Davidson v. Dallas*, 8 Cal. 227.)

§ 136. **Property Released by Judgment for Defendant.** — If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent. (§ 553, C. C. P.)

§ 137. **Judgment for Defendant Dissolves an Attachment.**—In case of a dismissal of an action by a justice of the peace for non-appearance of the plaintiff, the judgment for defendant operates as a dissolution of an attachment, although the justice reinstates the case, and the parties appear and try it. (*O'Connor v. Blake*, 29 Cal. 313.)

§ 138. **Death of Defendant Destroys Attachment Lien.**—If the defendant die after the levy of an attachment upon his property, and before judgment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator, to be administered on in due course of administration. (*Myers v. Mott*, 29 Cal. 351.)

§ 139. **Release of Personal Property.**—When an attachment on personal property is released, the property should be returned to the person from whom it was taken. The direction to release the attachment should be in writing, signed by the plaintiff or his attorney. There may be circumstances attending a case where such direction should come from the plaintiff's attorney, and not from the plaintiff. The plaintiff may, through ignorance, divest himself of his rights by causing a release to be precipitately made; and, hence, as a rule, it is generally most prudent to look to the attorney for such instructions. In the case of *Perlberg v. Gorham*, 10 Cal. 121, where a partnership existed between two persons in the purchase of goods, and they subsequently brought suit to recover their value from a trespasser who had seized them, it was held that one partner is competent to execute a release in the name of himself and co-partner. But it is not always safe to recognize such a right. In the case of *Perlberg v. Gorham*, 23 Cal. 349, the defendant Gorham, as sheriff, levied on goods claimed by the plaintiffs. After suit had been brought, one of the attaching creditors procured a release from one of the plaintiffs, executed in the name of both, of all actions, etc.; it was held that if this release was obtained by fraud, it was void, and the sheriff could derive no advantage from it, although he was not implicated in, and knew nothing of the fraud.

If, after an execution has been levied on sufficient property to satisfy the judgment, the court orders that the judgment be not enforced, the order releases the levy, and it will not have the effect of satisfying the judgment. (*Mulford v. Estudillo*, 22 Cal. 132.)

In the attachment of personal property, the officer.

is responsible for its value from the moment the attachment is levied. If the plaintiff recover judgment, he will look to the officer for the value of the goods levied upon, or sufficient thereof to satisfy his judgment.

Hence, it will be seen that the preservation of the property is of the utmost importance. If the property, or any portion of it, be not forthcoming at the proper time, the officer must make the loss good. When a keeper is required, the officer should select the person who is to take care of the property. Neither the plaintiff nor the defendant may dictate to the officer as to who shall take charge of the goods. The writ commands him to "attach and safely keep the property." He should make the expense of keeping it as light as possible, consistent with its safe-keeping.

Where a mutual friend of the attaching creditor and debtor offers to act as keeper without pay, and the offer is accepted, a stipulation to that effect should be given to the officer, in writing, signed by the creditor and debtor and the keeper. Experience, however, teaches that such a concession is often productive of annoyance and loss. The person thus acting as keeper is likely to consider himself less the trusted agent of the officer than the obliging friend of one or the other of the litigants. In such cases, circumstances are liable to arise wherein he cannot faithfully serve two masters—the litigant on the one hand, and the officer on the other. Such a course may sometimes be followed with safety, when there is but one attachment on the property. But if a second writ is placed in the hands of the officer, the officer becomes also liable to the second attaching creditor, and should assume such control over the goods as could not be questioned. When personal property is released from

attachment, the officer should take a receipt therefor from the person to whom it is delivered. Where the property has been taken from the defendant, it should be returned to the defendant or to his agent, or to such person as the defendant may, in writing, direct the officer to deliver it to. An officer cannot with safety ignore these seemingly unimportant business formalities. A sheriff attached the contents of a livery stable, and by request of the attaching creditor and debtor, placed a mutual friend in charge as keeper who, by verbal agreement, was to serve without pay.

Some days afterwards the plaintiff notified the sheriff that the suit had been settled. The officer returned the writ in due time and dismissed the affair from his mind. In the meantime, the stable had changed hands; and in the course of some months later, the defendant brought an action against the officer for the return of the property attached or the value thereof. The officer found to his cost that he had been dealing with unscrupulous persons, and had a narrow escape from paying a heavy pecuniary penalty for his laxity in dealing with them in the earlier proceedings.

§ 140. **Return of Writ.**—The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto. (§ 559, C. C. P.) In computing the time, the day of its receipt is excluded and the last day included. The writ of attachment must not be returned until the last day, except by written instruction from the plaintiff or his attorney. After having made a levy under the writ, the plaintiff may find other property which he desires to be attached,

and if the writ has been returned, he will lose the opportunity to secure such other property, and the sheriff will be held accountable therefor.

§ 141. **What the Return should Contain.**—The sheriff's return upon process is a report of his proceedings thereunder. Where the language of the law, which requires him to do certain things in the service of process, is mandatory, he should make the wording of his return conform strictly to the requirements therein expressed, if he has faithfully followed those requirements in making the service. If he serve a garnishment upon A., who fails, neglects, and refuses to answer; and, subsequently, by direction of the plaintiff, he serve another garnishment upon A., who answers thereto that he has, or has not, money or goods belonging to the defendant, the officer must make return of both services. He must not take for granted that because no answer was made by A. to the first garnishment, it was a useless service, and that therefore no return need be made of that service; for it may be necessary for the plaintiff to show in subsequent proceedings that a copy of the writ and notice of garnishment had been served upon A. at the time the first service was made.

CHAPTER VIII.

EXECUTION—LEVY ON PERSONAL PROPERTY.

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§ 142. **The Writ.**—Before “receiving” the writ and indorsing upon it the time of its reception, the officer should examine it to satisfy himself that it is regular on its face. For it may sometimes happen, in the hurry of issuing a writ, that some feature essential to its validity may have been omitted by the clerk, and the omission have passed unnoticed by the person to whom it was delivered.

§ 143. **Although a Writ may be Regular on its Face,** yet the officer will not go harmless if he execute it if there were defects in the proceedings

upon which it was issued. Although the law declares (§ 4187, Pol. Code.) that “a sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued,” yet if he know of any irregularity in those proceedings he will put himself in jeopardy the moment he proceeds to execute the writ. The assurance of protection to the officer implied in the section here quoted, is to be found in nearly all works that treat upon or refer to the duties of ministerial officers, and yet there are perhaps but few such officers who have not at some time or other found themselves in the position of party defendant in vexatious and expensive suits, by blindly relying upon the unqualified promise contained therein. No legislative assurance of protection to an officer for serving process illegally issued can divest a party aggrieved by reason of such service from his right to seek his remedy in the courts against the officer. After an officer has been brought into court in an action against him for taking property under an illegal process, he may or may not be able to justify himself and avert the penalties prescribed for willful wrong-doers, but his justification will then have come too late to shield him from the annoyances and expense of a defense.

§ 144. **Void and Voidable Writs.**—Who may issue the writ of execution, its form, to whom it must be directed, and what it shall require, are laid down in mandatory terms in § 682 of the Code of Civil Procedure. An officer should satisfy himself by an examination of the writ that those requirements have

been complied with. The decisions of the courts differ widely as to the responsibility of an officer in executing void writs. If it is not regular on its face he may return it to the party who delivered it to him, who must take it to the officer who issued it for correction, if the error is such that correction can be made. A writ is not regular on its face if it is not issued in the name of the people, nor, (if a Superior Court writ) if it has no seal. The word "seal" includes an impression of the seal required to be used upon the paper alone as well as upon wax or a wafer affixed thereto. If the writ is subscribed by a deputy clerk and not by his principal, it does not comply with the law, which provides that it must be subscribed by the clerk. Executions that are not regular on their face are liable to be vacated; and, although irregular and voidable in some instances, where they are issued upon a valid judgment, the officer cannot refuse to make a levy.

If an execution is regularly issued on a valid judgment, entered on a default, and the sheriff levies on property by virtue of the same, and retains it several days, until the default is opened and the judgment set aside, and then returns it to the defendant, the plaintiff is not liable in damages for the seizure and detention of the property, so that he acted without fraud. (*White v. Adams*, 52 Cal. 435.) An execution issued on a void judgment will be set aside. A joint judgment rendered against two partners, where but one of them was served with summons, is void. A judgment is absolutely void, if it appear that there was a want of jurisdiction in the court rendering it, either of the subject matter, or the person of the defendant. In the case of *Rowley v. Howard*, 23 Cal. 401, wherein a summons was served by a deputy sheriff and returned

with the following signature to the return: "Elijah T. Cole, D. S.," and judgment was rendered by default, it was held that the judgment was null and void, for want of jurisdiction. When the summons is unauthorized and void, the attachment must fall also. (*Hisler v. Carr*, 34 Cal. 641.) Judgment by consent or confession for over \$300 in a Justices' Court is void. Unless an execution issue within five years, the judgment is void. The filing and docketing of a transcript of a judgment rendered by a justice of the peace in the office of the clerk of the county, does not empower the clerk of the court in which it is filed and docketed to issue an execution on the same after five years have elapsed from the date of its rendition. (*Kerns v. Graves*, 26 Cal. 156.) If an officer receives an execution, and he knows that the judgment has been satisfied, he cannot levy thereunder.

An execution must be warranted by the judgment. If it exceeds the judgment it has no validity. (*Davis v. Robinson*, 10 Cal. 411.)

If an execution correctly refers to a judgment, in such manner as to identify it, it is sufficient to justify the sheriff in enforcing it, even if it contains an error in reciting the day on which the judgment had been rendered. (*Franklin v. Merida*, 50 Cal. 289.)

Executions not under seal, issued from a court which has been abolished, or is not of competent jurisdiction, or upon a void judgment, or upon a judgment against an administrator, or after the death of the judgment debtor, or after an appeal and stay, instanced by the court as probable examples of void executions. (*Hunt v. Loucks*, 38 Cal. 372.)

The plaintiff, in an action of ejectment, relied upon an execution sale, to which neither he nor the defend-

ant was a party. The execution called for \$695 more than the judgment, but corresponded with it in other respects: *Held*, that the execution was not void, but voidable only, and the sale therefore valid. *Id.*

If the execution calls for the amount of the judgment in the court below, and for the costs of an appeal also, it is not, for that reason, irregular. *Id.*

A sale made under a valid, though erroneous judgment, which has not been reversed or set aside, is valid. (Moore v. Martin, 38 Cal. 428.)

One who takes an assignment of an erroneous judgment, and procures an execution to be issued on it, and becomes a purchaser of land sold under the execution, is not entitled to protection as a *bona fide* purchaser, and is liable in an action for damages caused by the sale. (Reynolds v. Hosmer, 45 Cal. 616.)

§ 145. **Judgment Void as to Defendants not Served with Summons.**—If several persons are the owners of a tract of mining claims as tenants in common, and are known by a company name, and an action is commenced against all of them as individuals composing the company, on a money demand, and a judgment is rendered against all, as the persons composing the company, and the claims are sold by virtue of an execution issued on the judgment, and a deed executed to the purchaser, and if one or more of the defendants were not served with process, and did not appear in the action: *Held*, in Wiseman v. McNulty, 25 Cal. 231, that the purchaser does not acquire any title as against the persons not served with process, and who did not appear.

§ 146. **Writ cannot be Received on Sunday.**

A writ of attachment or execution placed in the sheriff's hands on Sunday, cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. (*Whitney v. Butterfield*, 13 Cal. 335.)

§ 147. **Justices' Court Executions.**—Execution for the enforcement of a judgment of a Justice's Court may be issued at any time within five years from the entry of judgment. It must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its delivery to the officer. At the request of the judgment creditor, the writ may be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. (§§ 901–903, C. C. P.)

A justice of the peace may adjudge a party guilty of contempt, who, on proceedings supplementary to execution, refuses to obey an order directing him to deliver to an officer property which he has, liable to execution, and may direct him to be imprisoned until he complies with the order. In such cases the jurisdiction of the justice is not limited to a fine of \$100 and one day's imprisonment, for § 1219 of the Code of Civil Procedure applies to Justices' Courts.

The filing and docketing of a transcript of a judgment rendered by a justice of the peace in the office of the clerk of the county does not empower the clerk of the court in which it is filed and docketed to issue an execution on the same after five years have elapsed from the date of its rendition.

Under § 902 of the Code of Civil Procedure a constable may serve an execution out of his township.

Real estate of a judgment debtor, situated in the county where the judgment before a justice of the peace was rendered, may be sold on execution upon the judgment, whether a transcript of the judgment be filed in the office of the recorder of such county or not. (*Campbell v. Wickware*, 19 Cal. 145.) No filing of such transcript with the recorder is necessary, except as to property situated in a different county.

With reference to property in the same county, the provisions for the enforcement of an execution upon a judgment in a Justice's Court are the same as those relating to Superior Courts.

Where plaintiff seeks to enjoin a sale of personal property, under an execution issued upon a judgment recovered against him in a Justice's Court, on the ground that the summons was never served on him, and therefore that the justice never acquired jurisdiction of his person: *Held*, that plaintiff's remedy is by motion in the Justice's Court to set aside the execution. (*Comstock v. Clemens*, 19 Cal. 77.)

Where property is levied upon by a constable or sheriff, by virtue of an attachment or execution, as the property of the defendant in the suit, and is claimed by a third party, and a jury is called to try the right of property under the claim, and the verdict of the jury is against the claimant, this verdict is no protection to the officer in suit brought against him by the claimant, nor is it admissible in evidence as a defense. (*Sheldon v. Loomis*, 28 Cal. 122.)

§ 148. **How to Determine what is Exempt from Execution.**—Between the desire of the plaintiff

to secure his debt, and the defendant to hold on to as much of his property as he can, the officer often finds himself perplexed as to how he can faithfully discharge his duty and do justice to both contestants. He should exercise the same sound discretion, as well as diligence, in securing property under the writ, as though he were in pursuit of a claim of his own.

The exemption law, as a rule, is liberally construed by the courts, as being remedial, beneficial, and humane in its character. § 690, Code Civil Procedure, declares what personal property shall be exempt from execution. In specifying the different kinds of property, it does not in every instance state the quantity that shall be exempt, and, hence, officers sometimes find themselves in a dilemma as to the limit to which they are bound to go. The law allows the judgment debtor to retain "necessary household, table, and kitchen furniture." When certain household furniture was claimed as exempt from execution (*Haswell v. Parsons*, 15 Cal. 266), the fact that the number of beds claimed—six in all—was greater than was required for the immediate and constant use of the family, was held to be no objection. Plaintiff was a farmer, householder, and head of a family, having a wife and three children dwelling with him. The court held that while it was possible that a less number of beds would have accommodated the plaintiff and his wife and children, yet it would be a very narrow construction of the statute to limit the exemption to the number required for immediate and constant use.

By the first and second subdivisions of the 690th section of the Code of Civil Procedure, there is exempted certain household furniture, wearing apparel, and provisions for three months for the use of the

family. This exemption is for the benefit of all classes of judgment debtors, whatsoever may be their vocations; because these articles are essential to all families.

By reference to the second paragraph of subdivision 13 of § 690, it will be seen that household furniture and any other species of property mentioned in that section, may be levied upon under execution (and attachment) issued for its price or purchase money thereof.

The next succeeding four subdivisions were intended to exempt such articles as were used by the judgment debtor in earning a support for himself and family in his particular vocation. Hence, the third subdivision exempts the farming implements of a farmer, and two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses, or mules, for one month; and all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of \$200, etc. This exemption is to enable the judgment debtor to earn a support by farming, and secures to him the means appropriate to that end.

The exemption of property liable to seizure and sale by the third subdivision of § 690 of the Code of Civil Procedure is declared, in *Robert v. Adams*, 38 Cal. 383, to be intended to apply only to oxen, horses, or mules, suitable and intended for the ordinary work conducted on a farm.

The provisions of the third subdivision of § 690, Code Civil Procedure, (with the exception of that of "one horse and vehicle belonging to any person who

is maimed or crippled, and the same is necessary in his business") relate exclusively to exemptions in favor of judgment debtors who are farmers. (Robert *v.* Adams, 38 Cal. 383.)

When a house is personal property, it is personal property capable of manual delivery, and must be attached as provided by the third subdivision of § 542 of the Code of Civil Procedure.

If an officer go upon a ranch or farm to levy upon the personal property of the debtor, and find there, of horses or other animals attachable, only the number that is specified in § 690 as exempt from execution, he will not be justified in refraining from levying upon them for that reason alone, for it may be that the debtor may have other property of a similar kind elsewhere. If it is in the officer's knowledge that the debtor has no other animals of that kind elsewhere, a levy upon those present, that are by law exempt, would be a superfluous proceeding. But if he has been directed by the plaintiff or his attorney to make the levy, he should do so, if they or either of them have reason to believe the debtor is not entitled to the exemption. He may require an indemnity bond if there be any doubt in his mind, and will be protected by the bond.

Where the debtor has several horses, and two are exempt from execution, he may elect which shall be exempt; but if he has some not in the jurisdiction of the officer, and so beyond the reach of the execution, and there is only one within the reach of the execution, he cannot defeat the creditor's levy on that one by electing to keep it. Such a course would be using the statute, which was intended for beneficent purposes, as a means of evasion and fraud.

The fourth subdivision exempts the tools or implements of a mechanic or artisan, *necessary to carry on* his trade; the notarial seal, records, and office furniture of a notary public; the instruments and chests of a surgeon, physician, surveyor, or dentist, *necessary to the exercise of their profession*, with their professional libraries and necessary office furniture, etc.

The fifth subdivision exempts the cabin of a miner, his sluices, pipes, hose, windlass, derrick, cars, pump, tools, implements, and appliances *necessary for carrying on any mining operations*, etc.

And here comes in the question as to what appliances may be exempt from execution as fixtures belonging to the realty, and not removable as personal property, and is treated upon elsewhere in this volume under the title of "fixtures."

The sixth subdivision exempts two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses, *by the use of which* they "or other laborer" habitually earns his living, etc.

Where two mules are claimed as exempt from forced sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. (*Calhoun v. Knight*, 10 Cal. 394.)

§ 149. **What is a Teamster.**—In the sense of subdivision 6, § 690, Code Civil Procedure, one is a "teamster" who is engaged with his own team or teams in the business of teaming, viz.: in the business of hauling freight for others for a consideration, by which he habitually supports himself and family, if he

has one. While a teamster need not drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. (*Brusie v. Griffith*, 34 Cal. 302.)

§ 150. **What Not a Teamster.**—If a carpenter or other mechanic who occupies his time in labor at his trade, purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a “teamster” in the sense of the statute. (*Brusie v. Griffith*, 34 Cal. 302.)

§ 151. **Laborer.**—By “other laborer,” as used in the sixth subdivision of § 690, C. C. P., is meant one who labors by and with the aid of his *team*, and not by the aid of a pick and shovel, or the implements of other trade or vocation. (*Brusie v. Griffith*, 34 Cal. 302.)

§ 152. **Teamster or Laborer.**—Where B., who claimed two horses, etc., as exempt, was a clerk in a store, at a stated salary, and had purchased said horses, etc., mainly to furnish employment for his son, who was seventeen years old, and by whom exclusively the team was used habitually in hauling freights for said store and for other parties, and in delivering goods from said store to customers, all of which was done for the benefit of B. and his family: *Held*, that B. was neither a teamster nor other laborer in the statutory sense. (*Brusie v. Griffith*, 34 Cal. 302.)

In the case of *Dove v. Nunan*, 62 Cal. 399, the property in controversy consisted of two horses and a

wagon, which were claimed by the plaintiff as exempt from execution. The court said: "The court below found that 'the plaintiffs were and are a firm doing business as coal dealers. * * * That the plaintiffs used the property sued for as teamsters. That they hauled coal and other commodities for others, for hire and pay, and received money therefor; all of which was expended in the support of plaintiffs and their families, all of whom resided in the same house and ate at the same table. That as coal dealers, and for the purpose of delivering coal at retail and in small quantities, the plaintiffs had and owned a smaller cart, truck, or wagon, and one other horse. That the only use which the plaintiffs made of the wagon and horses—the subject of this suit—for themselves, other than as teamsters for pay, was in hauling coal and wood from plaintiffs' coal-yard, and other coal and wood yards, to the place where the plaintiffs retailed the same, as above found herein.'

"The fact that the plaintiffs used the horses and wagon in question as teamsters for hire, and that they expended the money thus received in the support of themselves and their families, did not exempt the property from execution. In order to entitle a party to claim as exempt from execution two horses, etc., under the sixth subdivision of § 690, he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster, or other laborer, *and that he habitually earns his living* by the use of such horses, etc. (Code of Civil Procedure, § 690; *Brusie v. Griffith*, 34 Cal. 302.)

"The findings in this case do not show that state of facts.

"Judgment and order reversed."

In the case of *McCue v. Tunstead*, opinion filed May 19th, 1884, the Supreme Court say: "The court found in substance that the plaintiff was the owner and in the possession of a farm of about one hundred and fifty acres of land, which he cultivates for raising grain, etc., and that the horse which this action was brought to recover was used as a work horse on said farm—sometimes singly and sometimes doubly. It is also found that the plaintiff is the publisher of a weekly newspaper and the proprietor of patent medicines, although his main reliance for support is upon his farm, 'and almost the entire income from that is from the services of said horse as a stallion and the agistment of mares for breeding to him.'

"The plaintiff is the owner of other horses pledged for a debt owing by him, and in the possession of the pledgee.

"In addition to 'the farming utensils or implements of husbandry of the judgment debtor,' the law exempts from execution *two horses*. (C. C. P. 690, subd. 3.) The findings establish beyond doubt that the plaintiff employed this horse in husbandry. He was a farm-horse in the same sense that the plows, harrows and wagons used on the farm were utensils or implements of husbandry. Conceding that some of the uses to which the horse was put were not strictly in the line of husbandry, he was nevertheless one of two horses owned by the judgment debtor, and employed by him in husbandry. The law does not specify how much or what use shall be made of 'the farming utensils or implements of husbandry,' or of the two horses exempted from execution. They are exempt because owned by a judgment debtor engaged in husbandry. And in order to make them exempt, it is

not necessary that the owner of them should devote himself exclusively to husbandry. Such is not the language of the law. It does not say the farming utensils, etc., of a husbandman or farmer shall be exempt; but the farming utensils, etc., of husbandry. That is, utensils, etc., employed by the judgment debtor in husbandry or farming. This is the obvious meaning of the language, and we do not feel at liberty to hold that when a judgment debtor shows that he is carrying on a farm, and has but two horses which he uses in farming, that they are not exempt because he sometimes uses them for some other purposes. That would necessitate the importation of something into the law which it does not now contain.

“Judgment reversed with directions to the court below to enter judgment in favor of the plaintiff on the findings.”

§ 153. **Earnings of Judgment Debtor.**—Although the law provides that “the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment,” may be claimed as exempt from execution, when such earnings are necessary for the use of his family, etc., there is recorded, in 59 Cal. 107, a case wherein a county officer’s monthly salary was applied on an execution. It would seem, however, that in that case, the auditor and treasurer must have been in sympathy with the judgment creditor, for otherwise the sheriff might easily have been frustrated in making the levy. And, even when the warrant for the debtor’s salary came into the sheriff’s hands, the sale thereof might have been prevented if the debtor had claimed his privilege of exemption. Instead of

doing so, however, he allowed the sale to go on without protest, and received from the sheriff the overplus of the sale. The debtor subsequently made application for a writ of mandamus to the county treasurer, to compel him to issue another warrant for the salary, but the application was refused. Having had one warrant drawn and delivered to his lawfully constituted agent, the sheriff, and having obtained the benefit of the proceeds of the sale, by payment of judgments against him, he had not the right to have another warrant for the same services drawn and delivered to him, and obtain double payment from the county. The court held that "the debtor must have known all the facts as to the levy, seizure, and sale of the warrant by the sheriff, and his conduct was a ratification of the acts of the sheriff, though the warrant could not be levied on under a writ of execution."

The above construction of the exemption law secures—as the legislature intended it should—to the several classes mentioned, provision for earning their support.

§ 154. Exemption a Personal Right.—The exemption of property from sale on execution is a personal right which the debtor may waive or claim at his election. (*Borland v. O'Neal*, 22 Cal. 504.)

Exemption is a personal privilege. (*Gavitt v. Doub*, 23 Cal. 79.) Where the party failed to demand it, he thereby waived his privilege. (*Borland v. O'Neal*, 22 Cal. 505.)

§ 155. Debtor must Claim within a Reasonable Time.—An execution debtor who has more horses than the number exempt by law, may elect which he claims as exempt, but such election must be

made and the officer notified thereof either at the time of the levy or within a reasonable time thereafter, or the right to elect will be deemed waived. (*Gavitt v. Doub*, 23 Cal. 79.)

§ 156. **Unreasonable Delay in Claiming Exemption.**—Where several horses owned by an execution debtor were levied upon, and no notice of claim of exemption was given to the officer until the day of sale, which was four months after the levy: *Held*, that the right of election had been lost by the unreasonable delay in exercising it, and that the officer was justified in selling the property. (*Borland v. O'Neal*, 22 Cal. 505.)

§ 157. **Not Sufficient Claim.**—The officer is under no obligation to hunt up the debtor in advance of the levy, in order to procure a selection by him. The debtor waives his right by failing to claim it; and a claim under one execution, when no sale was made under it, is not sufficient when the property is levied upon and sold under a subsequent execution.

§ 158. **What Constitutes a Reasonable Time.** The notice of claim should be promptly given by the debtor, in order that the officer may levy on other property, in the place of that selected, to secure the debt, if there is any. What will constitute a reasonable time will, therefore, depend upon the particular circumstances of each case. There may be cases where a notice of the selection given at any time before the sale would be sufficient, as where it appears that no injury has been caused by the delay.

In suit against plaintiff in execution, for the value

of household furniture sold thereunder, as being exempt, defendant offered to show that plaintiff agreed to place the property in the hands of a third person, to be sold for the benefit of defendant, the creditor: *Held*, that the evidence was not admissible, because such agreement does not necessarily waive the exemption from forced sale. (Haswell *v.* Parsons, 15 Cal. 267.)

Where a party was absent in San Francisco, at the time his furniture was sold on execution, on account of sickness in his family, it is a sufficient excuse for not claiming the exemption at the time, the defendant, plaintiff in execution, being aware of such claim, it having been made on a previous seizure. (Haswell *v.* Parsons, 15 Cal. 266.)

§ 159. **A Stallion**, not used as a work-horse on a farm, but kept for the service of mares, is not exempt from execution. (Briggs *v.* McCullough, 36 Cal. 542.)

§ 160. **Grain on Homestead Land.**—The fact that land is homesteaded does not of itself exempt from execution all the grain grown thereon. It would be giving a strained interpretation to the language of the third subdivision of § 699 of the Code of Civil Procedure, to say it was intended, *in addition* to all the crop grown upon the homestead, that the debtor should be secured seed-grain to the value of \$200. It is obvious it is meant that only grain to that amount shall be exempt. (Horgan *v.* Amick, 62 Cal. 401.)

In the case of Dascey, *et al.*, *v.* Harris, an action in replevin, the following opinion was filed in the Supreme Court, June 28th, 1884: “The wheat which is the subject of this action was grown on the homestead of

plaintiffs. On the 15th of March, 1879, the plaintiff, John Dascey, filed his petition in insolvency, and such proceedings were had that on the 29th of April, 1879, he made an assignment of all his property, real and personal, to the defendant, assignee in insolvency. No property was specifically described in the assignment, but words of general description only were used. At the time of filing the petition, the premises constituting the homestead had been sown with wheat, which was then growing, and continued to be growing until after the assignment. Some time in August, 1879, after the wheat so raised on the premises had ripened, and been harvested, threshed, and sacked by said John Dascey, the defendant, as assignee, under an order of the County Court, seized the grain on the premises, and caused it to be removed therefrom. The wheat when so taken was of the value of \$1267. It does not appear that evidence was given of any damage to plaintiffs beside the value of the wheat.

“At the time of the assignment the wheat in controversy had not such an existence as that it passed to the assignee. At that time the growing wheat was a part of the homestead, at least to the extent that a conveyance of the homestead would have passed the growing crop.

“Judgment reversed and cause remanded, with instructions to render judgment on the findings in favor of plaintiffs for the possession of the property sued for; or in case a delivery cannot be had, for \$1267, with interest thereon from the date of the seizure by defendant, and for costs.”

§ 161. **Claim before Sale.**—A sheriff who levies upon and sells property exempt from execution is

liable for the value of such property, if claimed as exempt prior to the sale.

§ 162. **Sheriff cannot Sell when Stay is Ordered.**—A sheriff who sells property on an execution issued by a justice of the peace, after the justice has notified him that a writ of *certiorari* has been issued, and commanded him to stay all proceedings upon the execution, is liable for the value of the property. (Spencer *v.* Long, 39 Cal. 700.)

§ 163. **Deed of Trust.**—If a deed of trust leaves an interest in the trust property in the grantor, such interest may be sold on an execution against him. (Kennedy *v.* Nunan, 52 Cal. 326.)

§ 164. **Mining Claim Liable to Execution.**—The interest of a miner in his mining claim is property, and may be taken and sold under execution. (McKeon *v.* Bisbee, 9 Cal. 137.)

§ 165. **Property in Custody of Law.**—Property in the custody of the law is not liable to seizure, without an order from the court having charge thereof. (Yuba Co. *v.* Adams, 7 Cal. 35.)

§ 166. **Money Deposited with Sheriff to Release Attached Property.**—Where the defendant, in an action, whose property had been attached by the sheriff, deposited with the sheriff a sum of money in gold coin, in lieu of an undertaking, to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the

sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney: *Held*, that after plaintiff recovered judgment, the persons who borrowed the money did not hold it in the character of bailees of the sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution. (*Hathaway v. Brady*, 26 Cal. 581.) Under such conditions the money ceases to be in the custody of the law.

§ 167. **Personal Property Mortgaged.**—When an officer is directed to attach personal property which is subject to mortgage, he should, before proceeding to levy, or as soon thereafter as possible, ascertain if the property has been mortgaged. § 2955 of the Civil Code sets forth what personal property may be mortgaged, as follows :

1. Locomotives, engines, and other rolling stock of a railroad ;
2. Steamboat machinery, the machinery used by machinists, foundrymen and mechanics ;
3. Steam engines and boilers ;
4. Mining machinery ;
5. Printing presses and material ;
6. Professional libraries ;
7. Instruments of a surveyor, physician or dentist ;
8. Upholstery and furniture used in hotels, lodging or boarding-houses, when mortgaged to secure the purchase money of the articles mortgaged ;
9. Growing crops ;
10. Vessels of more than five tons burden ;
11. Instruments, negatives, furniture and fixtures of a photograph gallery ;

12. The machinery, casks, pipes, tubes and utensils used in the manufacture of wine, fruit brandy, and fruit syrup and sugar.

A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property, in good faith and for value, unless:

1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors;

2. It is acknowledged or proved, certified and recorded in like manner as grants of real property.

Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor; but, under § 2969 of the Civil Code, before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee.

When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows: 1st. To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and, 2nd. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

§ 168. **Attachment of Growing Crops.**—A chattel mortgage upon a growing crop, as against an attaching creditor, continues to be a lien upon the crop, in the possession of the mortgagor, after severance and removal from the land. (*Rider v. Edgar*, 54 Cal. 127.)

An officer cannot attach a growing crop, or any

other personal property, upon which there is a chattel mortgage, without satisfying the mortgage. If he seizes such property without paying or tendering the amount due on the mortgage, the mortgagee may bring an action against him; in such case, it was held in *Wood v. Franks*, 56 Cal. 217, the detriment proximately caused by the seizure is not the value of the property, but the amount of the mortgage debt; and this detriment, the officer, in seizing the property, assumes to make good. In the case here cited, one Wood was the holder of a chattel mortgage of growing crops, made by one Heron to secure the payment of a promissory note for \$1,487.25, which mortgage was recorded. The defendant, Franks, was sheriff, and as such, there was placed in his hands a writ of attachment against the property of Heron at the suit of another person. As such sheriff, the defendant, without paying, tendering or depositing the amount of Wood's debt, seized the property mortgaged by virtue of the writ of attachment. Wood demanded payment of his debt, and payment was refused by the sheriff. Plaintiff thereupon brought his action to recover the amount due him on the note and mortgage for principal and interest. Defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff declining to amend, judgment went for defendant. Plaintiff appealed. Besides the above facts, the opinion of the court contains the following:

“The statutes of this State applicable to this controversy, are found in the Civil Code, viz.:

“§ 1427. An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.

“§ 1428. An obligation arises either from (1) the contract of the parties or (2) the operation of law. An obligation arising from operation of law may be enforced in the manner provided by law, or by a civil action or proceeding.

“§ 2968. Personal property mortgaged may be taken under attachment, or execution issued at the suit of a creditor of the mortgagor.

“§ 2969. Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee.

“§ 3333. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

“Thus it will be seen that wherever there is an obligation arising from operation of law, and a breach of that obligation, the party injured may, by action, recover the amount which will compensate him for all the detriment proximately caused by the breach. It will also be seen that the law casts upon an officer the duty or obligation of paying to a mortgagee the amount of the debt due the mortgagee before he, the officer, may take the property. If an officer seizes personal property mortgaged, without paying, tendering, or depositing the amount due, the detriment proximately caused by such seizure is not the value of the property seized, but the amount of the mortgage debt.

“The officer is not bound to make the seizure unless the attaching creditor furnish him with the requisite

funds to make the payment. A failure to furnish the funds would be a good defense by the officer in a suit against him by the attaching creditor. If, however, the officer, waiving his right to be protected, seizes the property without payment, tender, or deposit, he assumes to make good to the mortgagee the detriment caused by the seizure; and the mortgagee is not left to his action of trover or replevin. Indeed, it might be that he would not be in a position to maintain either of those actions."

§ 169. **Other Chattel Mortgages.**—A transfer of property by chattel mortgage, properly executed and recorded, passes the title without delivery. (Civil Code, 2957.) The mortgagee is, in law, in possession of the mortgaged chattels, and an officer having an attachment or execution against the mortgagor is not authorized to levy upon them without first paying the mortgage debt. (*Berion v. Nunan*, opinion filed June 23, 1883.) A transfer of property by chattel mortgage, executed with the formalities of law and recorded, passes the title, although conditional and defeasible, whether the property be or be not delivered. The rights of the parties to the mortgage are fixed by the code; they are purely statutory rights, and as the code declares that such a mortgage is not void as to creditors or subsequent purchasers, for want of an actual and continued change of possession, the title of the mortgagee is not affected for want of it. (*Heyland v. Badger*, 35 Cal. 404.) The object to be attained by requiring the recording of mortgages of personal property is the same as that providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is

to give notice to the public of all existing incumbrances upon real or personal estate by mortgage. The recording of the mortgage is therefore made by the code the equivalent of an immediate delivery and continued change of possession, and creditors and subsequent purchasers or incumbrancers are bound by the notice which it imparts. By and under it, the mortgagee is, in law, in possession of the chattels, and an officer having an attachment or execution against the mortgagor, is not authorized to levy upon them without first paying the mortgage debt.

Where, on the trial of an action for the replevin of goods from a defendant who, in answer, admitted the taking, but justified under legal process against a third party, held and served by him as sheriff, it was proved by plaintiff that he held an unsatisfied chattel mortgage of the goods, duly executed by said third party, for their purchase-price, of which defendant had notice: *Held*, that upon this state of facts, and in absence of any evidence tending to justify the taking of the goods by defendant, plaintiff was entitled to judgment for their recovery. (Stringer v. Davis, 35 Cal. 25.)

§ 170. **How Growing Crops are Attached.**—An unripe growing crop is personal property not capable of manual delivery, and an attachment may be levied upon it as such. In the case of *Raventas v. Green*, Sheriff of San Mateo county, 57 Cal. 254, it is decided that an attachment upon such property in the possession of the defendant is sufficiently levied by serving upon him copies of the writ and statutory notice; and if the sheriff does nothing further until the crop is ripe, when he gathers it, there is no abandonment of the attachment. There is no doubt that

an unripe growing crop of grain is property. It is property subject to attachment (Code of Civil Procedure, § 541), and is personal property (Civil Code, § 2955; *Davis v. McFarlane*, 37 Cal. 638). And it is personal property not capable of manual delivery (*Davis v. McFarlane*, and authorities there cited). Being personal property not capable of manual delivery, and being subject to attachment, how is it to be attached? In the third subdivision of section 542 of the Code of Civil Procedure, it is provided that "personal property capable of manual delivery must be attached by taking it into custody;" and in the fifth subdivision, that "debts and credits, and *other personal property not capable of manual delivery*, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of such writ." "The purpose of the statute was," say the court, "as its language indicates, to declare the manner in which property subject to attachment should be attached; and with respect to personal property, provides that such property, when capable of manual delivery, must be attached by the officer taking it into his custody; but that where not capable of manual delivery, must be attached by leaving with the person having it in his possession or under his control, or with his agent, a copy of the writ and a notice that it is attached in pursuance of such writ. Personal property not capable of manual delivery, which is in the hands of the defendant to

the attachment suit, is as much liable to attachment as if in the hands of a third person."

Although the manner in which growing crops are to be levied upon is thus plainly pointed out—viz.: by garnishment—yet it would seem, (from the nature of the property, its exposed condition, and the fact that it may be subject to injury or destruction by maliciously inclined persons where it is protected merely by the service of a writ), not only proper but advisable on the part of the officer and plaintiff, when deemed prudent to do so, to place a keeper in charge of the property. As, under a ruling of the Supreme Court, noted elsewhere in this volume, the plaintiff's attorney is not authorized to direct the sheriff to incur such an expense, the direction should be given by the plaintiff or an agent lawfully authorized to act in such matters for him.

§ 171. **Property held as Security not Subject to Execution.**—A. being indebted to B., delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B. should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was afterwards levied upon by the defendants under an execution in their favor, against A., as his property: *Held*, that the lumber was not subject to seizure under an execution against A., without payment, in the first place, of his indebtedness to B. (Swanston & Taylor *v.* Sublette *et al.*, 1 Cal. 124.)

§ 172. **Sheriff's Sale of Road.** The levy upon and sale of a road, by virtue of an execution, gives to the purchaser no right or title to the same, for,

being the property of the public, the defendant in the execution has no interest therein which can be conveyed by the officer. (*Wood v. Truckee Turnpike Co.*, 23 Cal. 475.)

§ 173. **Patent Right Attachable.**—A patent right to an invention is liable to execution. So decided in *Pacific Bank v. Robinson*, 57 Cal. 520, and, further, that proceedings supplementary to execution are intended to take the place of a creditor's bill, and in such proceedings it is proper to order the execution debtor to make an assignment to a receiver of his patent right to an invention.

§ 174. **Property of Inhabitants not Liable for County Debts.**—The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. (*Emeric v. Gilman*, 10 Cal. 404.)

§ 175. **Interest of Purchaser at Judicial Sale Subject to Levy.**—"After the expiration of the time of redemption, and before execution of the sheriff's deed, the purchaser has an estate which is subject to be seized and sold. Upon the same principle, we can perceive no good reason why the interest of the purchaser may not also be seized and sold before the expiration of the time for redemption." (*Page v. Rogers*, 31 Cal. 305.)

§ 176. **Fixtures.**—Upon few subjects have there been more numerous or more diverse decisions than upon the question of fixtures. Though no great difficulty appears at first sight in the definition itself, yet

the application to particular facts has vexed the courts and given rise to an endless conflict of decisions. Kent defines a fixture to be "an article of a personal nature affixed to the freehold." It has been held that by the expression "annexed to the freehold," is meant, fastened to or connected with it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation. Where a tenant had erected a barn on pattens and blocks of timbers lying on the ground, but not fixed in or to the ground, it was held he might take them away at the end of his term. The author of Smith's Leading Cases says: "The general rule governing this subject is, that the tenant, if he have annexed anything to the freehold during his term, cannot again remove it without the consent of his landlord."

Again: "The general rule appears to be, that where the instrument or utensil is an accessory to anything of a personal nature, as to the carrying on a trade, it is considered a chattel; but where it is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part of the inheritance."

Things erected for the personal convenience of the tenant, which are personal in their nature, as a cider mill to be used during tenancy, are held not to be fixtures.

As between the landlord, who is the owner of the freehold, and the tenant, the rule is, that, during his term, the tenant may remove fixtures erected or placed by himself. But if he suffers them to remain fixed after his tenancy expires, and he quits the possession of the land, he cannot enter to remove them.

A fixture is an article of a personal nature annexed to the freehold, and may exist on public land. (*Merritt v. Judd*, 14 Cal. 60.)

A steam engine and boiler, fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Id.*

Such machinery, when applied to quartz leads, is a *trade fixture*, removable by the tenant, if otherwise entitled to remove it. *Id.*

But this removal can only be during the tenancy, and during such further period of possession by the tenant, as he holds *the premises under a right to still consider himself a tenant*, and not during the time he may actually hold possession after his lease has expired. *Id.*

This right of removal by the tenant may be regulated by agreement between the parties, and, possibly, by implication, from the custom of a particular district. *Id.*

Such machinery, so fixed, is included by the phrase in the lease, "improvements that may be put up on the ground for working the lead." And where the lease stipulated that the improvements shall go to the lessor on termination of the lease, if the rent was not paid, or if the lessee declined to purchase, as per the lease he might, the lessor's right to the fixtures is not destroyed by the tenant contracting, subsequently, to buy, and taking a bond for title on payment of the purchase money, but failing to fulfill his bond. *Id.*

A renewal of a lease terminates the tenant's right to remove fixtures. So with any other agreement which terminates possession under a lease. *Id.*

Although a lessor of land cannot, in a given case, claim the fixtures, it is otherwise of the mortgagee at

the lessee. Here the question is between grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. *Id.*

A general deed of mortgage, or bargain and sale, passes the fixtures as part of the freehold. *Id.*

At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee, to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate, and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Id.*

§ 660 of the Civil Code declares the following things to be fixtures: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." Fixtures attached to mines are declared by § 661 of the Penal Code to be: sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine. In the case of *McKiernan v. Hesre*, 51 Cal. 594, it is held that an engine resting upon and fastened by bolts and nuts to timbers which are embedded in the soil, is a part of the realty; also a steam boiler secured by trestle-work imbedded in the soil and resting on and surrounded by mason-work of stone and mortar built on the ground.

In the case of *Fratt v. Whittier*, 58 Cal. 127, in the opinion of the court, a number of authorities are quoted as to the character of fixtures. The court

said: "This is an action to recover certain gas fixtures, consisting of chandeliers, globes, brackets, burners, pendants, etc., a kitchen-range with boiler attached, a patent water-filter, tanks, and window-screens. The property was attached to a building known as the Orleans Hotel, situate on a lot of land fronting on Second street, in the city of Sacramento. As owner of the hotel, the plaintiff, on Oct. 15, 1879, contracted in writing to sell the same to the defendant, by the following description, viz.:

"Lot No. 6, in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging. The sale was made for \$28,000, gold coin, payable after an examination and approval of the title, upon receiving from the plaintiff possession of the property and of a deed of grant of the same, on or before the 1st of November, 1879, reserving to the plaintiff, among other things, the right within ten days after delivery of possession, to remove from the upper rooms of the hotel his 'furniture, carpets, and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed.' On the 25th of October the defendants, having satisfied themselves about the plaintiff's title, paid the full amount of the purchase money and received from the plaintiff possession and a deed of grant of the property. The deed described the property the same way that it had been described in the contract of sale, and it also contained the recital that the deed had been made in pursuance of the contract of sale and subject to the terms, conditions, and reservations therein contained. Within ten days after the delivery of possession, plaintiff demanded of the de-

fendants the privilege of removing the articles in controversy from the hotel, which being refused, this action was instituted, and the question arises whether the articles are personalty, or fixtures which passed as appurtenances of the realty by deed of grant.

“If the question arose out of the deed alone, it might not be difficult of solution, for the weight of authority seems to be in favor of the proposition that they are to be regarded as movable property, capable of being severed from the building; yet the authorities upon the subject are conflicting. In *McKeage v. Hanover Fire Insurance Company*, 81 N. Y. 38, the Supreme Court of New York held that gas-pipes which run through the walls and under the floors of a house are permanent parts of the building; but fixtures attached to such pipes, where they are simply screwed on projections of the pipes from the walls, which can be detached by unscrewing them, are not appurtenances, and so do not pass by deed or under a mortgage of the premises, and the mere declaration of the owner that he intends that such articles shall go with the house does not make them realty.

“In *Guthrie v. Jones*, 108 Mass. 198, it was held that, as between landlord and tenant, gas-fixtures, though fastened to the walls, were not annexed to the realty so as to become part of it. They are, says the court, in their nature, articles of furniture, and the fact that they were fastened to the walls for safety or convenience, does not deprive them of their character as personal chattels and make them a part of the realty.

“In *Vaughen v. Haldeman*, 33 Pa. St. 523, the court says: ‘Lamps, chandeliers, candlesticks, candelabra, screens, and the various contrivances for lighting houses by means of candles, oil, or other fluids, have

never been considered as fixtures and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures.' In *Jarechi v. Philharmonic Society*, 79 Pa. St. 403, S. C. 21 American Reports, 78, the case of *Vaughen v. Haldeman* was reviewed and approved. Says Sharwood, J.: 'Houses are considered as finished by the builders when the gas-fittings are completed. The fixtures are put up in more or less expensive style, according to the taste and means of the persons who mean to occupy them, whether as tenants or owners. If the tenants put them in, it is not denied that, as between him and the landlord, they are his, and he may remove them, or they may be sold as personal property, on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is—fixtures and all—the purchaser is not entitled to them. We see, then, no reason for departing from the judgment in *Vaughen v. Haldeman*.' To the same effect are *Shaw v. Leuche*, 1 Daly, 487; *Montague v. Dent*, 10 Rich. 138; *Roger v. Crow*, 40 Mo. 91; *Lawrence v. Kemp*, 1 Duer. 363; *Towne v. Fiske*, 127 Mass. 125.

"On the other hand, it has been held by the Supreme Court of Kentucky, in the case of *Johnson v. Wiseman*, 4 Metc. (Ky.) 357, that where a vendee of a house, in possession, purchased and put into it gas fixtures, chandeliers, etc., which were affixed by means of screws, to iron pipes let into the walls of the house for the purpose of conducting gas to the burners, such chandeliers,

etc., became fixtures which passed by deed of the realty, in the absence of any express provision to the contrary, although they may be removable without injury to the walls or the ceiling of the house, or to the pipes to which they are attached. The same doctrine was enunciated in *Smith v. Commonwealth*, 14 Bush, 31, as one about which there was no question. Whatever, indeed, is accessory to a building, for the more convenient use and improvement of the building, is considered to pass by a deed of the premises. Thus, articles placed in a mill by the owner, to carry out the obvious purpose for which it was erected, are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere. (*Parsons v. Copeland*, 38 Maine, 537.) In a building erected as a factory, the steam works relied on to furnish the motive power, and the works to be driven by it, are essential parts of the factory, adapted to be used with it, and would pass by a conveyance of the real estate. (*Winslow v. Merchant's Ins. Co.*, 4 Metc. 306.) Apparatus for the manufacture of gas are fixtures. (*Hays v. Doane*, 3 Stock. 84.) Gas burners are of the same character. They are in no sense furniture, but are mere accessories to the building. (*Keeler v. Keeler*, 31 N. J. Eq. 191.)

“What is accessory to real estate, is, according to the rule of the common law, part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture, and domestic convenience; and courts recognize and enforce the right of removal by a tenant, of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation does

not apply as between heir and executor, vendor and vendee. As between the latter, the rule of the common law is still applicable, except so far as it may be modified by statutory regulations on the subject. So that chattels attached to the freehold by the owner, contributing to its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey. (*Tourtellot v. Phelps*, 4 Gray, 378.) And after conveyance they cannot be severed by the vendor or any one else than the owner.

“As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed, and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash kettles, appertaining to a building for manufacturing ashes, (*Miller v. Plumb*, 6 Cowen, 665; S. C. 16 Am. Dec. 456); a cotton-gin fixed in its place (*Bratton v. Claussen*, 2 Strob. 478); a steam-engine to drive a bark mill (*Oves v. Oglesby*, 7 Watts, 106); kettles set in brick in dyeing and print works (*Dispatch Line v. Bellaney Man. Co.*, 12 N. H. 207); iron stoves fixed to the brick work of chimneys (*Goddard v. Chase*, 7 Mass. 432); wainscot work, fixed and dormant tables, engines and boilers used in a flour mill and attached to it (*Sands v. Pfeiffer*, 10 Cal. 259); a steam-engine and boiler fastened to a frame of timber and bedded in a quartz ledge and used for the purpose of working the ledge (*Merritt v. Judd*, 14 Cal. 50); a conduit or water pipe to conduct water to a house (*Philbrick v. Ewing*, 97 Mass. 134) hay poles in use

on a hop farm (*Bishop v. Bishop*, 11 N. Y. 123); statues erected for ornament, though only kept in place by their own weight (*Snedeker v. Warring*, 12 N. Y. 170). In fact, whatever the vendor has annexed to a building for the more convenient use and improvement of the premises passes by his deed. The true rule deduced from all the authorities, says the Supreme Court of Virginia, seems to be this, that, when the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purpose for which the building is used, will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either. (*Green v. Phillips*, 26 Gratt. 752; *Shelton v. Ficklin*, 32 *Id.* 755.)

“Judged by these rules, it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their nature, the circumstances under which they were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself, by his testimony, shows that the globes were lettered ‘Orleans Hotel,’ and that they, with the chandeliers, etc., were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste-pipe which ran through the wall of the building, and connected with a sewer

in the alley outside, and the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main, or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito-transoms and window-screens were fitted to the windows and transoms of the hotel—each window and transom-frame being fitted to its particular window, and shoved up and down in it on grooves, and all of them were necessary to the hotel as its windows, its blinds and shutters. All of the articles were, therefore, essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, ‘it would not have been a hotel without them.’ They were, therefore, fixtures which passed by the deed of grant to the defendants, unless they were specially reserved by the deed. But the deed reserved none of the articles. It was made, according to its recitals, in pursuance of the agreement of the 15th of October, and subject to the terms, conditions, and reservations therein contained and expressed.

“As already stated, the agreement reserved only the furniture, pictures, and carpets of the upper rooms of the building, and none of the ‘permanent fixtures or appurtenances to the property.’ In the absence from the deed of any special reservation of the articles, it must be presumed that the parties, by their agreement, considered them as permanent fixtures and appurtenances of the hotel, which were to pass by the deed; it is a well settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may

have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their agreement, courts will enforce it. (Smith *v.* Waggoner, 50 Wisc. 155; Hunt *v.* Bay State Iron Co. 97 Mass. 279; Ford *v.* Cobb, 20 N. Y. 344; Tiff *v.* Horton, 53 *id.* 377; Ford *v.* Williams, 24 N. Y. 359; Smith *v.* Benson, 1 Hill, 176; Menagh *v.* Whitwell, 52 N. Y. 146.)

“So the plaintiff, when he contracted to sell the hotel property with its appurtenances and improvements, reserving from the sale only the carpets, furniture, and pictures of the upper rooms of the building, fixed upon all the chattels which he had annexed to the hotel, and which were necessary to its use and enjoyment, the character of appurtenances and improvements of the hotel. None of them by any possibility of construction could fall within the reservation of ‘furniture, carpets, or fixtures in the upper rooms of the hotel.’ The plaintiff, therefore, sold the articles in question as fixtures with the hotel, and as such they passed by his subsequent deed of the premises to the defendants.

“Personal property annexed to realty still retains its character as such, if the parties so intended in annexing it, unless it has become so absorbed or merged into the realty that its identity as personal property is lost, as where it cannot be removed without practically destroying it, or where it is essential to the support of that to which it is attached. (Hendy *v.* Dinkerhoff, 57 Cal. 3.)

“A party who has placed improvements and fixtures upon land which he has leased upon condition that he should have the right to remove them, cannot be

estopped from taking them away, even though he may have inadvertently signed a lease with no such conditions therein. In the case of *Isenhoot v. Chamberlain*, opinion filed in our Supreme Court February 11, 1882, plaintiff and defendant entered into an agreement for the lease of land upon certain conditions named in the lease, and the further condition, that on or before the expiration of the lease, defendant should have the right to remove from the land certain fixtures and improvements previously placed there by him. During negotiations for the lease, plaintiff at all times admitted that defendant was the owner of the improvements and fixtures, and entitled to remove them, and that the right of removal should be a condition of the lease. The lease was reduced to writing by the procurement of the plaintiff (lessor), and when read to defendant (lessee) he refused to sign the same unless such condition was added to the lease. But, upon being informed by the plaintiff that he (plaintiff) knew the fixtures and improvements belonged to defendant, and that the omission of the conditions from the lease would make no difference, and that defendant should have the right of removal, the defendant accepted the assurance of plaintiff, and relying thereon, and believing in the good faith of plaintiff, was induced to, and did, execute the lease, omitting the condition: *Held*, plaintiff was estopped from claiming the improvements and fixtures, and that defendant, having commenced to remove the same previous to the expiration of the lease, would not be restrained by injunction; and that defendant was entitled to have the lease reformed.

“A tenant who puts up machinery for a mill, in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it; but, as between

vendor and vendee, such machinery would be considered as a part of the realty. (*McGreary v. Osborne*, 9 Cal. 119.)

“D. purchased a lot of land at sheriff’s sale on execution, and entered into possession and erected certain buildings thereon. On the 25th day of May, 1858, D. removed the buildings. On the same day the buildings were removed, the defendants in execution sold the premises to T., and a day or two after, T. redeemed the lot from the sale, and then brought suit against D. to recover the value of the buildings: *Held*, that, as there was no evidence that the buildings were attached to the soil, T. cannot recover. (*Tyler v. Decker*, 10 Cal. 436.)

“In the absence of any agreement to the contrary, a dwelling-house and barn erected upon the land of his landlord by a tenant becomes a part of the realty. A lessee, before the expiration of his term, erected a house and barn on the leased premises. At the expiration of the term, a new lease was taken of the premises, without reserving the rights of the lessee to the buildings so erected: *Held*, in *Marks v. Ryan* (filed January 31st, 1883), that the buildings become fixtures annexed to the land, and conversion therefor could not be maintained.

“The general rule of law is, that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. Though the rule has been in modern times greatly relaxed, as between landlord and tenant, in relation to the things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use, it remains in full force as between vendor and vendee.

“As a general thing, a tenant may remove what he has added, when he can do so without injury to the estate, unless it has become, by its manner of addition, an integral part of the original premises; but as against a vendor, all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, unless specially reserved in the conveyance.

“The engine and boilers, etc., used in a flour-mill, being permanently fastened to the mill, which had its foundation in the ground: *Held*, to be fixtures covered by a mortgage upon the premises, though put up after the execution of the mortgage, and held to pass to the purchaser of the mortgaged premises under a decree of foreclosure.”

§ 177. **When Fixtures become Personal Property.**—By the wrongful severance from the premises, the fixtures become personal property, for the recovery of which an action of replevin will lie by the purchaser after he obtains the sheriff's deed. (*Sands v. Pfeiffer*, 10 Cal. 259.)

§ 178. **The Law of Exemptions.**—§ 690 of the Code of Civil Procedure exempts certain kinds of property from levy and sale, as follows:

The following property is exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, desks, and books, to the value of \$200, belonging to the judgment debtor;

2. Necessary household, table and kitchen furniture belonging to the judgment debtor, including one sewing-machine, stoves, stove-pipes, and furniture, wearing apparel, beds, bedding, and bedsteads, hanging pictures, oil paintings, and drawings drawn or painted by

any member of the family, and family portraits and their necessary frames, provisions actually provided for individual or family use sufficient for three months, and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month;

3. The farming utensils or implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules and their harness, one cart or wagon, and food for such oxen, horses, or mules for one month; also, all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of \$200, and seventy-five bee-hives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business;

4. The tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public; the instruments and chest of a surgeon, physician, surveyor, or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school-teachers, and music-teachers, and their necessary office furniture; also, the musical instruments of music-teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps, and office furniture of a searcher of records, necessary to be used in his profession;

5. The cabin or dwelling of a miner, not exceeding in value the sum of \$500; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, imple-

ments, and appliances necessary for carrying on any mining operations, not exceeding in value the aggregate sum of \$500, and two horses, mules, or oxen, with their harness, and food for such horses, mules, or oxen for one month, when necessary to be used in any whim, windlass, derrick, car, pump, or hoisting-gear, and also his mining claim actually worked by him, not exceeding in value the sum of \$1000;

6. Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living, and one horse with vehicle and harness, or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business, with food for such oxen, horses, or mules for one month;

7. Poultry not exceeding in value \$25;

8. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this State, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessities of life, the one-half of such earnings above mentioned are, nevertheless, subject to execution, garnishment, or attachment to satisfy debts so incurred;

9. The shares held by a member of a homestead association duly incorporated, not exceeding in value \$1000, if the person holding the shares is not the owner

of a homestead under the laws of this State. All the nautical instruments and wearing apparel of any master, officer, or seaman of any steamer or other vessel;

10. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed \$500;

11. All fire engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this State;

12. All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor;

13. All court houses, jails, public offices and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and appertaining to the jail and public offices belonging to any county or to any city and county of this State, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this State.

No article, however, or species of property mentioned in this section, is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage thereon.

§ 179. **Within what Time Execution may Issue.**—The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. This applies to Superior and Justice's Courts. In all cases other than for the recovery of money, in the Superior Court, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings.

The statute limiting the time for issuing execution upon a judgment to five years after its entry, applies to judgments rendered in suits to foreclose a mortgage, equally as to mere personal judgments. (*Stout v. Macy*, 22 Cal. 647.)

The judgment roll is only required to be made up by the clerk after the entry of the judgment, but execution may lawfully be issued and enforced so soon as this judgment is entered and before the filing of the judgment roll. (*Sharp v. Lumley*, 34 Cal. 612.)

The statute does not require the docketing of the judgment to precede either the issuing or service of the execution. The docket creates and preserves a lien for two years, but without docketing the judgment, execution may be issued upon it, and real estate levied upon and sold, and the sale and conveyance will pass all the interest held by the judgment debtor at the time of the levy. (*Hastings v. Cunningham*, 39 Cal. 137.)

§ 180. **Execution when Judgment not Entered.**—An execution issued upon a valid judgment is sufficient authority to the sheriff to make a sale of

lands. In the case of *Los Angeles Bank v. Raynor* (opinion filed July 27, 1882), judgment was given and signed by the judge, June 27, 1876; the judgment was not entered in the judgment book until March 21, 1881, when it was then endorsed by the clerk of the court, entered as of June 26, 1876, by stipulation of the defendant; execution was issued June 27, 1876, and the return of the sheriff endorsed thereon, August 1, 1876, showing that he had sold the premises to the plaintiff; on which sale a deed was made by the sheriff, February 1, 1877. It was not claimed that the judgment given June 27, 1876, was void. Being valid, it was enforceable by execution, and the execution which was issued to enforce it was sufficient authority to the sheriff to make the sale. It was urged that the record showed that the judgment was not entered when the execution was issued, and the court held that it was not necessary that it should have been; that the enforcement of a judgment does not depend upon its entry or docketing; that these are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (§ 681 C. C. P.), or in which the judgment may be enforced (§ 685 *Id.*); and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. (§ 671 C. C. P.) But neither is necessary for the issuance of an execution which has been duly rendered. Without docketing or entry, execution may be issued on the judgment, and land levied upon and sold (*Hastings v. Cunningham*, 39 Cal. 144); and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it. (*Dodge v.*

Walley, 22 Cal. 224; McDonald *v.* Badger, 23 *Id.* 399; Cooper *v.* Galorauth, 3 Wash. C. C. 550; Blood *v.* Light, 38 Cal. 619.)

§ 181. **Power of Justice over his Judgments.**—A justice of the peace has power to recall an execution issued by him on a void judgment, and stay further proceedings, even if the judgment has been docketed in the office of the county clerk and the execution has been issued by the clerk. (Gates *v.* Lane, 49 Cal. 266.)

§ 182. **Enjoining Justice's Judgment.**—If a judgment rendered by a justice of the peace is void on its face, a suit in equity cannot be maintained to restrain its enforcement by execution, even if the execution is issued by the county clerk on a copy of the judgment docketed with him. *Id.*

§ 183. **Judgment after Filing Homestead.**—A judgment obtained after the filing of a declaration of homestead cannot be enforced against a homestead, although an attachment may have been levied upon the premises before the filing of the declaration. (Sullivan *v.* Hendrickson, 54 Cal. 258, affirming Harris *v.* McCracken, *Id.* 81.)

§ 184. **Void Judgment and Levy.**—A voluntary confession of a judgment made upon a *bona fide* debt by the debtor in favor of the creditor, without the knowledge of the creditor, and the issuance of an execution thereon at the request of the debtor, and a levy on the debtor's goods by virtue thereof—also without the knowledge of the creditor—for the purpose

of enabling the creditor to obtain priority over other creditors of the debtor, is such a fraud upon the other creditors as renders the judgment and levy void, as to an attachment or execution in favor of the other creditors afterwards levied on the same property. (*Wilcoxson v. Burton*, 27 Cal. 228.)

§ 185. **Staying Execution.**—If a judgment upon which an execution issues and the execution itself are void upon their face, the court has power on motion to afford relief, and can arrest the process. (*Sanchez v. Carriaga*, 31 Cal. 170.)

Notice of a motion to set aside an execution and a levy made thereunder, will not operate as a stay of proceedings. (*Bryan v. Berry*, 8 Cal. p. 124.) On this point, the court says: "We think the District Court did not err in overruling the motion to set aside the execution and levy. The notice that a motion would be made, did not operate as a stay of proceedings. After giving the notice, the defendant should have procured an order staying the sale under the execution until his motion could have been heard." (*Greenup v. Brown*, Breese, 193; *Beard v. Foreman*, Breese, 385; *Robinson v. Chisseldine*, 4 Scam.)

Where third parties have purchased at an execution sale, it is too late to move to set aside the execution.

An undertaking for costs and damages under § 941, Code of Civil Procedure, stays proceedings on an appeal in all cases, except those specified in §§ 942–5, Code of Civil Procedure, and it was held, in *Root v. Bryant*, 54 Cal. 183, that upon an appeal from a judgment for the foreclosure of a lien and the sale of the property subject thereto—the appeal being taken

by a lien-holder, not in possession of the land, whose lien was adjudged subordinate to the lien foreclosed—that the undertaking for costs and damages staid the judgment.

§ 186. **When Voidable.**—If an execution directs the levy of more money than the judgment calls for, it is not for that reason *void*, but only *voidable*. (Hunt *v.* Loucks, 38 Cal. 372.)

§ 187. **When Amendable.**—If an execution calls for too much money, it will not be set aside, but amended, so as to agree with the judgment, upon the application of the parties to it, or either of them. (Hunt *v.* Loucks, 38 Cal. 372.)

§ 188. **Sales when Valid and when Void.**—Sales to a *bona fide* purchaser under *voidable* executions are *valid*, though the executions be afterwards set aside, but sales under *void* executions are invalid, and pass no title, even to a *bona fide* purchaser.

§ 189. **Not open to Collateral Attack.**—Executions which are merely voidable cannot be attacked collaterally even by the parties to them, much less by strangers. (Hunt *v.* Loucks, 38 Cal. 372.)

§ 190. **Executions not Void.**—Executions which have been issued according to the established course of practice, and are not so erroneous that they cannot be amended, are not void. (Hunt *v.* Loucks, 38 Cal. 372.)

An execution which is not issued in the name of the people, or directed to the sheriff, is held in the

case of *Hibberd v. Smith*, 50 Cal. 511, to be amendable, and, therefore, is not void, but only voidable, and a sale under it is valid.

§ 191. **Indemnity Bonds—Sheriff's Jury.**—The numerous suits to be found in the court records against sheriffs and constables would seem to indicate that the greatest risks incurred by these officers in civil cases lie in the taking of property under writs of attachment and execution. Where the property belongs to the defendant, and there is no controversy concerning its ownership, the path of duty is smooth and clear. The officer has only to follow the course pointed out by the law to a satisfactory conclusion. But when the property levied upon is claimed by a stranger to the writ, the officer's responsibility begins. When the creditor appeals to the courts for aid in the collection of his account, the debtor, as a general rule, either succumbs to the inevitable force of circumstances or assumes an attitude of hostility. If he submits to a seizure and sale of his effects, in acknowledgment of the justness of the creditor's claim, the officer's course is simple and easily performed. If, on the other hand, the debtor choose to throw obstacles in the creditor's way, the officer finds himself beset with difficulties and dangers. Transfers of personal property are easily effected, and, under the pressure of legal proceedings, the whilom successful merchant, contractor, or what not, has suddenly become insolvent. If the transfer has been legally made, the creditor has no redress. If the requirements of the law have not been complied with, concerning the delivery and possession of the property, the creditor may cause it to be seized under legal process and made to answer for

the debt. Although the debtor may have actually sold his property, received the purchase-money for it, and given written evidence to the purchaser of the sale, yet the sale will not stand before the law if there has not been an actual delivery of the property and a continued possession thereof in the purchaser. Relying upon his legal rights, which so closely adapt themselves to his moral rights in the matter, the creditor pursues the property and claims his remedy in it. The sooner, then, that the officer who has levied upon the property secures an indemnity bond with sureties upon whom he can rely for the payment of any judgment that may be rendered against him in favor of the claimant—the easier will be the burden of his duties thereon. § 689, Code Civil Procedure, provides that: “Whenever property levied upon under execution be claimed by a third person as his property, the sheriff may summon from his county six persons qualified as jurors, between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff, and the witnesses must be paid by the claimant, if the verdict be against him; otherwise, by the plaintiff. Each party must deposit with the sheriff, before the trial, the amount of his fees and the fees of the jury, and the sheriff must pay the same to the prevailing party.

“The plaintiff is entitled to a reasonable time to furnish the bond—dependent mainly upon the distance

he has to go to procure the sureties, and in this, the officer should indulge him so far as he can do so with safety to himself. If the plaintiff or his attorney agree to give the bond, the plaintiff is responsible in law to the officer from that time; and if the plaintiff is financially responsible, the officer may safely proceed to levy, if he has not already done so. It would not, however, be advisable to notice the property for sale until the receipt of the bond."

§ 192. **Time a Bond takes Effect.**—A bond to indemnify a sheriff takes effect from the time of its delivery. (*Buffendeau v. Brooks*, 28 Cal. 642.)

§ 193. **What the Writ must Require.**—The writ of execution issued out of the Superior Court must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof and the amount actually due thereon, and if made payable in a specified kind of money or currency, the execution must also state the kind of money or currency in which the judgment is payable. (See § 682, C. C. P.)

§ 194. **Execution after Death of a Party.**—Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

1. In case of the death of the judgment creditor, upon the application of his executor, or administrator, or successor in interest;

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon. (§ 686, C. C. P.)

If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. (See § 1505, C. C. P.)

§ 195. **“Receiving” the Writ.**—The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment-roll is filed. (§ 683, C. C. P.) The receipt of a writ by the officer dates from the time he endorses it as received. A writ may be handed to a sheriff and he may refuse to “receive” it until his fees for service be paid. The time for its return does not therefore commence to run until it has been endorsed “received.”

§ 196. **Property and Rights of Property liable to Levy.**—All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interest in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold-dust must be returned by the officer as

so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution. (§ 688, C. C. P.)

§ 197. **Levy upon Judgments.**—The method of levying upon a judgment is so clearly and authoritatively pointed out in the decision of the Supreme Court of the State of California, in the case of *McBride v. Fallon* (decision filed May 30, 1884), that the portion of that decision relating thereto is herewith quoted, as follows:

“After enumerating the kinds of property of a judgment debtor liable to execution, the code provides that ‘shares and interests in any corporation or company and *debts* and *credits* * * * and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment.’ (C. C. P. 688.)

“‘Debts and credits, and property not capable of manual delivery, must be attached’ in the mode pointed out in subdivision 5, § 542, C. C. P. That is, ‘by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.’

“The fact that a debt is evidenced by a judgment does not, in our opinion, make it anything more or less than a debt; or more capable of manual delivery than it would be if not so evidenced. No provision is made for attaching or levying on *evidences* of debt. It is the debt itself which may be attached by writ of attachment,

or 'on execution in like manner as upon writs of attachment.' This we think to be the meaning of the code ; and the mode prescribed by it is exclusive. (C. C. P. 4 and 18.) These views are not opposed to any heretofore expressed by this court in any case to which our attention has been directed. In *Adams v. Hackett* (7 Cal. 187), a referee, in proceedings supplementary to execution, made an order that the judgment debtor should assign a judgment which he held against a third party. The Superior Court vacated the order, and on appeal, this court reversed the order of the Superior Court. It is unnecessary to point out the distinction between that case and this.

"In *Crandall v. Bien* (13 Cal. 15), *Adams v. Hackett*, although not overruled, appears to be doubted.

"In *Davis v. Mitchell* (34 *Id.* 81), it was held that a sheriff might, under an execution and sale, levy on a promissory note belonging to the judgment debtor, and that the purchaser took it subject to any defense which the maker might have had against it, if the payee had retained it. In that case, the sheriff had possession of the note, and delivered it to the purchaser. The court alluded to that circumstance, without passing upon its materiality. The case arose and was decided before the enactment of the code, which, while it does not prescribe a mode of proceeding in such cases materially different from that pointed out by the late Practice Act, makes that mode exclusive. But independently of that circumstance, we could not, with our present views, assent to the doctrine of that case."

§ 198. **Levy and Sale of Franchise.**—A franchise may be treated as property and sold under execution. For the satisfaction of any judgment against

a corporation, authorized to receive tolls, its franchise and all the rights and privileges thereof may be levied upon and sold under execution, in the same manner and with like effect as any other property. § 389 of the Civil Code requires the sheriff to give to the purchaser at such sale a certificate of purchase. Such sale must be made in the county in which the corporation has its principal place of business, or in which the property or some portion thereof, upon which the taxes are paid, is situated.

§ 199. **Redemption of Franchise.**—The corporation may, at any time within one year after such sale, redeem the franchise, by paying or tendering to the purchaser thereof, with ten per cent. interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof, revert and belong to the corporation, as if no such sale had been made. (§ 392, Civil Code.)

§ 200. **Property of Wife not Liable for Husband's Debt.**—The property of the wife cannot be taken under an execution against her husband. § 8 of Article XX of the Constitution, provides that all property, real and personal, owned by either husband or wife before marriage, or that acquired by either of them afterwards, by gift, devise, or descent, shall be their separate property; and § 168 of the Civil Code declares that the earnings of the wife are not liable for the debts of the husband.

A transfer of personal property by gift from the husband to the wife creates separate property in the

wife, and is valid as to all, except existing creditors and *bona fide* subsequent purchasers without notice. Such a transfer cannot be attacked as fraudulent and void as to subsequent creditors in an action for the recovery of the property by the wife against an officer who has seized it under an execution, unless he proves not only the issuing of the execution, the levy, and that he was a creditor, but also the rendition of a judgment upon his debt, and that the execution was issued upon the judgment. In the case of *Kane v. Desmond* (opinion filed June 6th, 1883), the defendant seized the piano in controversy from the possession of plaintiff, by an execution issued in favor of *A. L. Day v. Thomas Kane*, and sold it at execution sale as the property of Kane to satisfy the execution. Thomas Kane was the husband of plaintiff. On the trial of the case, the court found that the plaintiff was, at the time of the seizure and sale, the sole and exclusive owner of the property, in her own right, and entitled to its possession, and that her husband had no right or title to it. The seizure of the property was, therefore, wrongful. (*Wellman v. English*, 38 Cal. 583; *Lewis v. Johns*, 34, *Id.* 629; *Van Pelt v. Little*, 14, *Id.* 194); and the plaintiff was entitled to recover. The court said: "But the finding is attacked as against the law and the evidence in this, that the evidence showed the plaintiff's claim of title to the property was founded on a gift from her husband, which was void as to his creditors. But it does not appear that the husband was indebted to anyone at the time of the gift, except to the person from whom he had rented the piano under an agreement to purchase it on the installment plan. Being free from debt, the husband had the right to transfer his interest

in the property to his wife by gift, and the wife, under the law, had the capacity to take and hold it in her own name and right." (Dow *v.* Gould & Curry S. M. Co., 31 Cal. 629; Woods *v.* Whitney, 42 *Id.* 358; Higgings *v.* Higgings, 46 *Id.* 259; Peck *v.* Brumagin, 31 *Id.* 440.) The gift was complete, for the evidence tended to show that immediately after the husband had rented the piano under the agreement to purchase, he delivered it to his wife as a gift, and she accepted it, and used it continuously as her separate property until the time of the seizure. Now, this transfer by gift was valid and effectual between herself and her husband and all the world, except existing creditors and *bona fide* subsequent purchasers without notice. There was no proof that Day—the execution creditor—was a creditor of the husband at the time of the gift, and there is no presumption that the gift was void as to him as a subsequent creditor. (Wells *v.* Stout, 9 Cal. 479; Hussey *v.* Castle, 41 *Id.* 239.)

Presumptively, therefore, the gift was valid as between the parties; and, being valid, it vested in the plaintiff, as of her own right, whatever interest her husband had in the property. It was therefore her separate property; and the transaction by which she acquired it cannot be attacked as fraudulent and void as to subsequent creditors, except by such a creditor or an officer representing him. Here, however, the suit is not against one who claims to be a creditor; it is against the officer who levied the execution. But an officer who seizes the separate property of the wife by an execution against her husband, is not the representative of the execution creditor, for the purpose of attacking a legal transfer to the wife, un-

less he produces the judgment upon which the execution was issued. It is well settled that where an officer is sued for seizing or selling the property of one under an execution against another, he must, in order to show that the transfer of the property by the execution debtor was fraudulent and void as to the execution creditor, prove not only the issuing of the execution, the levy, and that he was a creditor, but also the *rendition* of a judgment upon his debt, and that the execution was issued upon the judgment. (Bickerstaff *v.* Doub, 19 Cal. 109; 2 Hillard on Torts, 544; Ames *v.* Sturtevant, 2 Allen, 583; Martin *v.* Padger, 5 Burr, 2663; Lake *v.* Bellers, 1 Ld. Rayd, 733.)

§ 201. **Delay in Service of Writ Inexcusable.** It is an old principle of law that, on the reception of a ministerial writ, it is the duty of the officer, if it be regular on its face, to obey its authority. He is not bound to enquire whether there is a judgment to support the execution, or whether the execution corresponds exactly with the judgment. If it be regular on its face, it is his duty to execute it; if there be any irregularity, it has been held that that affects the parties, not the ministerial officers. While the cold facts of experience have taught many officers otherwise, the question of the officer's responsibility in that regard will here be passed, and referred to elsewhere.

The terse maxim, "delays are dangerous," finds significant application in nearly all the duties of sheriffs and constables. It conveys an admonition which should never be lost sight of from one year's end to another. The evil of procrastination has subjected many an officer to loss, and they who are subject to it as a habit must prove unfitted for the discharge of the

important duties that devolve upon them as officers. An illustration in point (and there are many more on record in the courts) may be found in the case of *Howe v. Union Insurance Co.*, 42 Cal. 528, wherein the plaintiff was subjected to a loss of \$1465, by reason of the neglect of an officer to serve a garnishment under an execution which had been placed in his hands. Howe commenced an attachment suit against one McCann, and garnisheed money of McCann's in the defendant's hands, and afterwards recovered judgment, and issued execution to the sheriff. The officer went to the office of the insurance company for the purpose of collecting the money. The secretary of the company admitted having the money, but did not pay it over. The sheriff did not levy the execution, supposing that the money would be paid in a day or two. Before any further step had been taken, and within less than four months from the time when the attachment was issued and served, proceedings were commenced to have McCann declared a bankrupt. At that time, the bankrupt law provided that all attachments upon mesne process within four months before the proceedings in bankruptcy, shall be thereby dissolved, in case the defendant in the attachment be declared a bankrupt. Under that provision, it is clear that if the execution had been levied upon the fund before the proceedings in bankruptcy were commenced, he would have acquired a lien upon the fund, which would not have been divested by the proceedings in bankruptcy. As it was, the money went to the assignee in bankruptcy, and Howe was obliged to take merely his pro rata with the other creditors. The sheriff's proper course, in the premises, was to have served a garnishment upon the insurance company, and demanded possession of the money.

§ 202. **Levy on Partnership Property.**—If a sheriff has an execution against the property of one member of a partnership, it is his duty to levy on the interest of that partner in the partnership effects; and, in order to effect a sale of the same, he may take possession of the entire property; and if he only sells the interest of the partner against whom the judgment was rendered, he is not liable to the other parties for damages. (Clark *v.* Cushing, 52 Cal. 617.)

If two are tenants in common in personal property, and the sheriff in a suit against one, brought on a claim against him, attaches his interest in the common property, he may take all the property into his possession without being guilty of a conversion of the other tenant's share. (Veach *v.* Adams, 51 Cal. 609.) In Waldman *v.* Broder, 10 Cal. 378, certain personal property belonging to Waldman and one Franck had been seized by Broder, as sheriff, by virtue of an execution in his hands against the property of Franck; and Waldman who was a co-tenant of Franck, having brought his action in replevin against the sheriff, the District Court instructed the jury to the effect that if Waldman and Franck were owners of the property as partners or joint owners of it in any other capacity, the plaintiff, Waldman, could not recover; and the jury having found a verdict for the defendant, it was held by the Supreme Court that the instruction was correct, the court observing that "if the defendant, as sheriff, levied on the property while it was the joint property of plaintiff and Franck (against the latter of whom he had an execution), this is a justification. He had a right to levy on it, and take it into possession for the purpose of subjecting it to sale."

In the later case of *Bernal v. Hovious*, 17 Cal. 541, the case of *Waldman v. Broder* was cited and approved, the language of Mr. Chief Justice Field, who delivered the opinion of the court, being as follows: "Vasquez and the plaintiffs were tenants in common of the grain, and in attaching the interest of one of them, the sheriff was justified in taking and detaining the possession of the entire quantity, though he will not be authorized to sell under the execution on the judgment which may be recovered in that action anything but the undivided one-third interest of Vasquez. The purchaser at the sale and the plaintiff will then be tenants in common of the property.

"Where two persons who are tenants in common, the one farming the land of the other, under an agreement by which the former is to give the owner of the land a part of the crop raised for his own use, a contract may be entered into between them, by which the one who performs the work becomes divested of an attachable interest until the conditions of the contract have been complied with. In the case of *Howell v. Foster*, decision filed in department one of the Supreme Court, April 30, 1884, the court say:

"The plaintiff brought this action to recover the possession of 4455 sacks of wheat, 764 sacks of barley, and 230 head of hogs. In his complaint, which was verified, he alleged that he was the owner of the grain and hogs, and that defendant had, without his consent, taken the said property into his possession, and continued to withhold it from the plaintiff. Defendant who, at the times mentioned in the record, was sheriff of Tehama county, answering the complaint—the answer being also verified—denied the

ownership by the plaintiff of the property in question, and alleged that the same was owned by the plaintiff and one Mayfield as tenants in common, and that in his official capacity he (defendant) levied upon and took all of the property into his possession, under and by virtue of two certain writs of attachment duly issued out of the Superior Court of Tehama county in certain actions against Mayfield. Defendant also alleged in his answer that after his levy, the plaintiff, by virtue of a writ of replevin, took all of the property from his (defendant's) possession, and asked a return thereof to him, to be held subject to the aforesaid writs of attachment. When the case came on for trial, the court below, on motion of the plaintiff and against the objection and exception of the defendant, allowed the plaintiff to amend his complaint by striking therefrom all of the allegations in relation to the two hundred and thirty head of hogs, and also struck out of the defendant's answer all reference thereto. This was done upon the verbal statement of plaintiff's counsel that the defendant had not in fact levied the writs of attachment upon the hogs. But not only did the verified complaint of the plaintiff show that defendant had taken the hogs, but defendant, in his verified answer, alleged that he had levied upon them, and further alleged that subsequently to his levy, the plaintiff, by virtue of a writ of replevin, had taken the hogs from his (defendant's) possession. Under such circumstances the court below erred in allowing the amendment to the complaint and in striking out the portions of the answer referred to; for, if the averments of the answer were true, the effect of the action of the court was to take the hogs from the possession of the

defendant and transfer them to the plaintiff without affording the defendant an opportunity to try the question of his right to their return, which he affirmatively alleged. For this error we must reverse the judgment and remand the cause for a new trial; and as there must be a new trial, it is proper that we should pass upon the other question in the case.

“The action of the court below in the respect already indicated, left the case to be tried only as to the wheat and barley; and it was as to that only that the case was tried. Upon this branch of the case, the question is, ‘Did Mayfield have an attachable interest in the grain?’ It was raised by him on land belonging to the plaintiff, under a written instrument by which the plaintiff leased and demised to Mayfield the land for a certain term, with the covenant, among others, on the part of Mayfield, that he would till and cultivate the land in a good farmer-like manner, and, at the proper time, would sow the land to wheat, oats or barley, or proportions of each, and, at the proper time, would harvest, thresh, clean and sack the grain, and thereupon deliver all of it to plaintiff, to be held by him as security for all advances made by him to Mayfield, together with interest thereon, at the rate of one and one-half per cent. per month; ‘and,’ proceeds the contract, ‘such demands being satisfied, the said party of the first part (plaintiff) agrees, that upon said grain being sacked and delivered as aforesaid, he will deliver and transfer to the said party of the second part (Mayfield) his three-fourths of said grain, quality and quantity considered.’

“The instrument contained this further clause: ‘And it is mutually covenanted and agreed that until such delivery and transfer by the said party of the first

part (plaintiff) all of said grain shall be the property of the said party of the first part, and the said party of the second part (Mayfield) shall have no right to dispose of any portion thereof.'

"There was also a provision to the effect that the grain should be delivered after it was sacked, at the nearest depot or warehouse, and that the plaintiff should pay one-fourth of the cost of hauling it and one-fourth of the cost of the sacks used. There is no doubt that where one man farms land of another under an agreement by which he is to give the owner a part of the crop raised for its use, he and the owner, in the absence of a stipulation providing otherwise, become tenants in common of the crops raised. But it is just as clear that the agreement between the parties may be so framed as to secure to the owner of the land the ownership of the product until the performance of a certain stated condition. (*Wentworth v. Miller*, 53 Cal. 9; *Andrew v. Newcomb*, 32 N. Y. 419; *Lewis v. Lyman*, 22 Pick. 437; *Ponder v. Rhea*, 32 Ark. 435; *Smith v. Atkins*, 18 Vt. 461.) In the present case, the parties expressly agreed that all of the grain raised on the land by Mayfield should be delivered to the plaintiff and remain his property, and in no way subject to the disposal of Mayfield until all of such advances as the plaintiff may have made him had been satisfied, and he had thereupon received from the plaintiff his share of the grain, which plaintiff bound himself to deliver. Until all this happened, all of the grain, by the express contract of the parties, was to be and remain the property of the plaintiff, and in no way subject to the disposal of Mayfield. That it was competent for the parties so to provide has already been shown, and, having so provided, it results that Mayfield had no

attachable interest in the grain at the time of the levy of the writs in question. 'It is a fundamental principle,' says Drake on Attachment, § 245, 'that an attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.' See, also, authorities cited in support of the text, and *Tuohy v. Wingfield*, 52 Cal. 319.

"Our conclusion is, that the ruling of the court below was right with respect to the grain, but erroneous in regard to the hogs involved in the controversy.

"Judgment and order reversed, and cause remanded for a new trial. Ross, J.

We concur:

McKINSTRY, J.,
McKEE, J."

The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff, on an execution against one of the partners. But the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. In *Jones v. Thompson*, 12 Cal. 199, the court held that the interest of one partner in partnership property is such an estate under our statute as may be sold for his debts; it is a legal estate in chattels. It is true that as between the partners, the interest of each is only the residuum of the property left after the settlement of the firm debts; and that the rights of the

firm creditors and the several partners are paramount to the claims of separate creditors of the firm.

But this interest of the partner thus defined, is held by the weight of authority subject to levy for his debts. Story on Part., § 263, thus states the rule: "In cases of this sort, therefore, the real position of the parties, relatively to each other, seems to be this: The partnership property may be taken in execution upon a separate judgment and execution against one partner; but the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. By such seizure, the sheriff acquires a special property in the goods seized; and the judgment creditor himself may, and the sheriff also, with the consent of the judgment creditor, file a bill against the other partners, for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose, to wait until such interest is so ascertained, but he may require the sheriff to proceed to a sale, which order the sheriff is bound by law to obey. In the event of a sale, the purchaser at the sale is substituted to the rights of the execution partner, *quoad* the property sold, and becomes a tenant in common thereof; and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of interest which he has acquired by the sale."

When a sheriff, upon an execution against one partner, levies on and sells partnership property, he has a right to take possession of the whole property, and deliver it over to the purchaser.

It has been frequently decided by the Supreme

Court, that the creditors of a partnership are entitled to preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens. (*Chase v. Steel*, 9 Cal. 64; *Conroy v. Woods*, 13 *Id.* 626; *Dupuy v. Leavenworth*, 17 *Id.* 262; *Burpee v. Bunn*, 22 *Id.* 194; *Bullock v. Hubbard*, 23 *Id.* 501.) And the same principle applies as between the creditors of several partnership firms.

In the case of *Bullock v. Hubbard*, above cited, Bishop & Long were partners. Bishop & Long as a partnership was also a member of two other firms—Bishop, Long & Steuart, and Bishop, Long, Siefert & Dodsworth. The firms all failed, and their property was attached by creditors. The creditors of Bishop, Long & Steuart, and Bishop, Long, Siefert & Dodsworth, obtained the first attachments, and placed them in the hands of the sheriff, before the creditors of Bishop & Long placed their's in his hands. The sheriff levied all the writs on the property in the order in which they were placed in his hands. The sheriff had in his hands a sum of money received from the sale of the property of Bishop & Long, to apply on the executions issued on judgments rendered in the actions. None of the others, as partnership firms, had any interest in this money. The sheriff commenced an action requiring the creditors to litigate their respective rights to the money. The court below held, and the Supreme Court affirmed the judgment, that the creditors of the firm of Bishop & Long were entitled to the money realized from the sale in the order of the priority of their several attachment liens.

A separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee, to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims. It was held, in this case (*Burpee v. Bunn*, above cited), that neither by his attachment nor by the agreement, did the separate creditor acquire any title to, or lien upon, the property, as against the superior equity of a subsequently attaching creditor of the partnership.

If a party attach or levy upon the individual interest of a co-partner, he takes it subject to the payment of co-partnership debts.

In *Jones v. Thompson*, 12 Cal. 198, the court say: "The interest of each is only the residuum of the property left after the settlement of the firm debts, and that the rights of firm creditors and the several partners are paramount to the claims of separate creditors of the firm."

Mortgage of Interest of one of several Partners.—If two or more persons are partners in the ownership and management of real estate, and owe partnership debts, and one of the partners mortgages his interest in the property to secure his individual debt, the mortgagee acquires only the mortgagor's interest in the surplus after the payment of the partnership debts; and if these debts equal or exceed the value of the property, and it is afterwards sold by the partners to pay the partnership debts, the mortgagee, as against the purchaser, holds no interest in the property, liable in equity to be sold, and the mortgage cannot be foreclosed. (*Jones v. Parsons*, 25 Cal. 100.)

The lien of firm creditors is paramount to the lien of individual creditors. And, where one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just as before the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner attaching first. A lien by attachment enables a creditor to file a creditor's bill, without waiting for judgment and execution. Partners may make a *bona fide* sale of their property any time before their creditors acquire a lien; but such sale cannot include a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, there having been no credit given by the individual creditor on the strength of an apparent sole ownership in the vendee. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. In such cases of conflict between the individual and firm creditors, equity has jurisdiction. No action lies against the sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property. (*Conroy v. Woods*, 13 Cal. 626.) Distinguished, (*Reddington v. Waldon*, 22 Cal. 187.) Approved, (*Burpee v. Bunn*, 22 Cal. 199; *Bullock v. Hubbard*, 23 Cal. 501; *Jones v. Parsons*, 25 Cal. 106; see *Heynemann et al. v. Dannenberg et al.*, 6 Cal. 376.)

In an action against the members of a partnership, upon a joint and several promissory note, signed by them individually, but not with the firm name, an attachment was issued and levied upon the interests of defendants in the partnership property, upon which an

attachment previously had been, and others were subsequently, levied in actions against the firm. Subsequently, the plaintiff, under § 432 of the Code of Civil Procedure, amended his complaint, by alleging the partnership of the defendants, and that the note was a partnership debt; but the action still ran against the defendants, as individuals, and judgment was entered against them in that capacity. Judgments having been entered in all the cases, the property was sold under execution in one of the cases against the firm, and the proceeds applied in satisfaction of that execution and another in a similar case: *Held*, that the money was properly applied on the executions against the firm in preference to those of the plaintiff. (Commercial Bank v. Mitchell, 58 Cal. 42.) In this case, Mr. Justice McKee, who delivered the opinion of the court, said:

“This is an action to recover of the defendant the sum of \$1338.15, with seven per cent. interest from October 25th, 1879; money alleged to have been collected for the plaintiff by the defendant, as sheriff of Los Angeles county, and which he refused to pay to the plaintiff on demand. The action is therefore in the nature of an action for money had and received. The case was tried in the court below with a jury. The plaintiff had a verdict and judgment; and from the judgment and order refusing a new trial, the defendant brings the case before us on appeal. By the engrossed statement on motion for a new trial, it appears that on July 11th, 1879, James M. Riley and E. S. Rothchild were partners in trade, doing business in the city of Los Angeles, under the firm name of Riley & Rothchild; on that day several attachment suits were commenced against the firm, and others against

the individual partners of the firm. Among the latter were two suits instituted by the plaintiff in this action, one against James M. Riley and E. S. Rothchild, and the other against Samuel Rothchild, E. S. Rothchild, and James M. Riley. The first was to recover a balance due upon a joint and several promissory note made by James M. Riley and E. S. Rothchild; and the second to recover a balance due upon a joint and several promissory note made by Samuel Rothchild, E. S. Rothchild, and James M. Riley. It is admitted that in the original complaints filed in the plaintiff's actions, the defendants were not named as partners, either in the title or body of the complaint, and that the writs of attachment issued in them ran against the individual defendants, and commanded the sheriff to attach and safely keep all the property of such defendants within his county, not exempt from execution, to satisfy the plaintiff's demand, etc. The attachments in all the suits against the firm and against the individual members of the firm, were issued on the same day, and were placed in the hands of the sheriff for service according to law. The first which came to his hands was an attachment issued in the suit of L. & E. Emanuel against the partnership for a partnership debt. This the sheriff levied, July 12th, 1879, upon a stock of goods, wares, and merchandise—the partnership property of the firm. Afterwards, on the same day, defendant attached “the right, title, and interest” of the individual partners in the same stock of goods, at the suit of the plaintiff in the action against James M. Riley and E. S. Rothchild. Afterwards, on the same day, defendant again attached the partnership property, at the suit of one E. N. McDonald, against the partnership for a partnership debt. Afterwards,

on the same day, defendant attached the "right, title, and interest" of Samuel Rothchild, James M. Riley, and E. S. Rothchild, in the same partnership effects, at the suit of the plaintiff in this action against the said parties. And, afterwards, on the same day, defendant attached the same stock of goods as the partnership property of the firm, at the suit of Walter & Co., against the firm for a firm debt."

On the 22d day of July, 1879, the plaintiff, under § 432 of the Code of Civil Procedure, amended the complaints in its actions by alleging that the defendants, James M. Riley and E. S. Rothchild, were co-partners, and that the note described in each of the complaints was given by the defendants to secure payment to the plaintiff of moneys which had been loaned to them, and were used in the business of the firm. But the actions still ran against the defendants as individuals, and judgments were entered against them in that capacity. The first judgment was entered by default on August 8th, 1879, in favor of the plaintiff against Samuel Rothchild, James M. Riley, and E. S. Rothchild, for \$583, and \$26.25 costs; the second, August 11th, 1879, in favor of the plaintiff against James M. Riley and E. S. Rothchild, for \$648.90, and \$22 costs. Executions were issued on these judgments August 11th, 1879, and were levied by the defendant, at the instance of the plaintiff's attorney, upon "the interest of the defendant's in execution," in the stock of goods, belonging to the firm of Riley & Rothchild, which the defendant had seized and held under the writs of attachment in favor of the partnership creditors in the manner already stated. This interest the defendant advertised to sell, at execution sale, on the 18th of August, 1879; but on the day of

It is contended on behalf of the plaintiff, that the defendant received the proceeds of the sale of the attached property under the execution, in the suit of Walter & Co., for the benefit of the attaching creditors; that it was the duty of the defendant to apply the proceeds to the satisfaction of the executions in his hands, in the order in which the attachments had been levied, and that having failed to do so, he is liable to the plaintiff in this action for the amount of its attachments.

The attachment in Walter's case was levied last and satisfied first, although the plaintiff's attachments were levied before it; but the levies were upon different kinds of property. The one was upon partnership property, by partnership creditors, in an action against the firm, for a partnership debt; and the other was upon the interest of the partners in the partnership property, by individual creditors, in an action against the partners, in their individual capacities for personal debts. Both levies were valid; for the interests of partners in partnership property are subject to levy and sale for their debts. Such was the levy made by the defendant for the plaintiff, and there is no question that if there had been no prior or subsequent attachments levied upon the partnership property by partnership creditors, for debts of the firm, it would have been the duty of the defendant to have seized the entire property, under the levy of the partners' interest therein, and delivered it to a purchaser on execution sale. (*Phillips v. Cook*, 24 Wend. 389.) But the right of the sheriff to seize and deliver partnership property under an attachment of the individual interests of the partners herein, is only incidental to the right of the attaching creditor or purchaser to reach the interests of the members of the partnership, and is to be

exercised only as means to that end. (*Atkins v. Saxton*, 77 N. Y. 195.) And this right of the attaching creditor or purchaser to reach the interest attached, is an equitable one, which can be exercised only through the form of a proceeding for an accounting between the partners and a settlement of the partnership debts. (*Burrall v. Acker*, 23 Wend. 606.) Until the affairs of the co-partnership are wound up and settled, the claim of a partner is, strictly speaking, merely equitable, for, until then, no action can, in general, be maintained at law by one partner against the other for a portion of the profits, etc. (Story's Law of Part. p. 322.)

And after judgment, the accounting and settlement may be had by the attaching creditor, or the sheriff, before execution sale, or after sale, by the purchaser of the individual interests of the partners. "By the seizure of the partnership effects, the sheriff acquires a special property in the goods seized; and the judgment creditor himself may—and the sheriff, also, with the consent of the judgment creditor—file a bill against the other partners for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose, to wait until such interest is so ascertained, but he may require the sheriff immediately to proceed to a sale, which order the sheriff is bound by law to obey. In the event of a sale, the purchaser at the sale is substituted to the rights of the execution partner *quoad* the property sold, and becomes a tenant in common thereof; and he may file a bill to ascertain the quantity of interest which he has acquired by the sale." (Story on Part., § 263; *Jones v. Thompson*, 12 Cal. 199; *Robinson v. Tevis*, 38 *Id.* 611.)

The plaintiff's position as to the proceeds of the sale of the partnership property, under the execution in the case of Walter & Co. against the firm of Riley & Rothchild, was, therefore, simply this: "It had acquired by the levy of its attachments and the execution issued upon its judgments, a lien upon the individual interests of the firm in the firm property. It could have enforced this lien by a sale of the attached interests, or after the sale—if it had purchased at the sale—by an action in equity to ascertain the quantity of the interest, if any, remaining after the settlement of the partnership affairs and the payment of its debts. But as a lien-holder, the plaintiff made no use of its rights or its remedies. It did not command an action to ascertain whether there would be a surplus after the settlement of the partnership. It did not even sell the 'interests' upon which it had levied. By its own orders to the sheriff, the sale thereof was indefinitely postponed. The rights of the plaintiff were, therefore, by its own involuntary act, placed in abeyance; and when the defendant was called upon to sell the partnership property under the executions in favor of the partnership creditors, it was his duty to obey, and to apply the proceeds of the sale toward the satisfaction of the judgments against the firm. If, after the performance of that duty, there remained in his hands a surplus, the plaintiff might have been entitled to have it applied towards the satisfaction of its executions; for though its rights were in abeyance, they were not forfeited; they existed and were enforceable, according to law, at any time after the sale of the partnership property and the payment of the partnership debts against any surplus which might remain. But the proceeds of the sale were insuffi

cient to satisfy the executions, in the hands of the defendant, against the firm; there was therefore no surplus to be applied towards the satisfaction of the plaintiff's executions. The plaintiff was, therefore, not in a position to maintain an action in the nature of an action for money had and received against the defendant. 'To enable the plaintiff to recover,' says Sawyer, C. J., in *Robinson v. Tevis, supra*, 'the burden is on him to show that there was a surplus, and the amount of his share of the surplus. * * * Till this is done, and his share set off and appropriated to him, he is no more entitled to the possession or control of the fund than the partners.' Judgment and order denying a new trial reversed, and cause remanded."

* * * * *

Some of the questions relating to the duties of sheriffs in levying upon a harvested crop of grain, part of which is partnership property, and a part belonging to a stranger to the writ, and upon a portion of which there is a chattel mortgage, are so plainly elucidated in the opinion of the court, in the case of *Sheehy v. Graves* (58 Cal. 149), that the entire opinion of the court is herewith given :

"This is an action against the defendant, Graves, as sheriff, and the sureties on his official bond, for a breach of such bond. The cause was tried by the court, a jury having been waived, and judgment passed for the defendants. Plaintiff moved for a new trial, which was denied, and he appealed from the judgment and order denying a new trial.

"It is averred in the complaint, that on the 23rd of August, 1876, the plaintiff commenced an action in the District Court for Monterey county, against one Darius

Finch and Charles Shinn, for the recovery of about \$850; that the defendants having been served with summons, failed to answer, and judgment by default was, on the 23rd of October, 1876, entered against them, in favor of plaintiff, for \$846 and costs; that on the day the action was commenced, a writ of attachment was regularly issued, which came to the hands of defendant, Graves, sheriff, as aforesaid, and was by him, on the 24th of August, 1876, levied on certain wheat in sheaf and barley in stack, part of same being on Sheehy's land, and the other portion on the land of Rowe, which had been rented by Finch; that the wheat and barley seized on the Sheehy tract was the property of Finch & Shinn, and that on Rowe's land, was the property of Finch; that the property so levied on was, when seized under the writ, more than sufficient in value, after deducting all costs, charges, and expenses of every kind for harvesting and otherwise, to pay off and satisfy the claims of the plaintiff in said action, and the judgment therein recovered; that said property was never released from the attachment, and was not exempt from execution: that after the recovery of the judgment of 23rd of October, 1876, a writ of execution was issued on said judgment, and came to the hands of the sheriff, Graves, on the 3rd of November, 1876. The mandate of this writ of execution was in the usual form required by law. That the property attached was in Monterey county, and was the personal property of the debtors at the time it was attached. It is further alleged 'that the sheriff was in duty bound to hold and retain the attached property as security for the judgment and execution issued thereon, and to make out of the same the moneys by said writ of execution commanded to be made; that said sheriff has disregarded his said duty

and has failed and neglected, without the authority, consent, or other interference of the plaintiff, to collect said moneys, or make due return thereof as commanded by said writ, except the sum of \$319, gold coin, as aforesaid, but no more, which said sum was paid to this plaintiff on or about December 1st, 1876; that said sheriff, on January 8th, 1877, made return of said writ of execution, partly paid and satisfied, to wit: The sum of \$319, as aforesaid, but not further or otherwise, and has wholly and wrongfully failed and neglected to collect and make return of the moneys, as commanded and in duty bound under said writ, for the satisfaction of the balance of said judgment, interest and costs; that said balance is the sum of \$582.06, and legal interest thereon from January 1st, 1877, and no part of the sum has been paid or in any way satisfied. It is also averred that the judgment debtors, Finch & Shinn, had no property, real or personal, at or within the dates mentioned in the complaint, in said Monterey county, or elsewhere, except the property attached." The decision of the (lower) court is as follows:

"1. In the summer of 1876, two parties, named Darius Finch and — Shinn, were engaged as partners in farming in the county of Monterey, and rented from plaintiff, T. Sheehy, for that season, — acres of land.

"Besides the land so rented and worked by Finch & Shinn, as partners, — Finch rented and farmed upon his individual account a tract of land from — Rowe.

"2. Upon Finch's interest and growing crop upon the Rowe place, one Mooney had a mortgage. By arrangement of Finch with H. Jackson, Jackson, in

August, 1876, paid off the Mooney mortgage and then took a new mortgage from Finch for the amount paid Mooney, and also for a debt due to himself from Finch, and also for future advances to be made by Jackson to Finch. This mortgage was for about \$2200, and was executed upon the 21st of August, 1876, and was forthwith recorded in the proper records of Monterey county.

“At the date of the execution of this mortgage most of the grain was cut upon both the Rowe and Sheehy places, and the greater part of it had then been stacked.

“Jackson upon receiving the mortgage, went upon both places and examined the crop, and placed a man in charge of the crop. The Rowe and Sheehy fields were about one and a half miles distant from each other.

“3. Upon the 24th day of August, 1876, Timothy Sheehy commenced an action against ‘Finch & Shinn,’ and filed the affidavit and undertaking necessary to authorize an attachment, and an attachment issued in said cause, and was by the defendant as sheriff of Monterey county, executed by levying upon the interest of Finch & Shinn,’ or either of them, in the two parcels of land above described, and in the crop growing or being upon the same.

“At the time this levy was made, parties representing ‘Jackson’ were in the possession and occupation of both fields, and the sheriff was by them informed that Jackson claimed an interest in these crops.

“4. After the levy of this attachment, Sheehy prosecuted said action to final judgment, and recovered a judgment against Finch & Shinn, October 23d, 1876, for \$864.65, which judgment was and is in full force and only so far satisfied as is hereafter set forth.

"5. After the levy of said attachment, 'Jackson' proceeded to thresh said crop, and hired competent and suitable persons, and made the most advantageous terms practicable for the threshing and marketing of said crop.

"There was threshed and sacked upon said two tracts the following amounts and character of grain:

"'Upon the Rowe place—wheat, 77,500 pounds; barley, 19,072 pounds. Upon the Sheehy place—wheat, 64,098 pounds; Chevalier barley, 23,140 pounds; common barley, 21,625 pounds. There was expended by Jackson in harvesting the crop upon the two places, \$619.24.'

"It was agreed between Sheehy, the sheriff, and Jackson, that the latter should thresh and sack the grain, and that whatever belonged to the 'Shinn' interest should be delivered to the sheriff upon the Sheehy attachment. After the harvesting and marketing of the crop there was paid to the sheriff by 'Jackson' \$319, as the part belonging to 'Shinn,' and this was by the sheriff applied upon the 'Sheehy' attachment and execution, there remaining unsatisfied of the Sheehy judgment, above described, about \$582.50, together with legal interest from the date of its rendition.

"6. Besides the expenditures named by Jackson in securing this crop, he was obliged by the terms of the lease from 'Rowe' to pay the rent upon the Rowe tract, and did so. This amounted to \$400.

"7. After the sale and application of all the proceeds of the crop grown upon the Rowe and Sheehy places, the whole of said proceeds did not equal the advances made by and mortgaged to Jackson, and the costs incurred by him in harvesting the crop, by the sum of about \$300.

“All these costs and expenses were paid and advanced by Jackson personally.

“8. I find that the defendant used due and proper diligence in executing his writ in the Sheehy case, and that all the money and property available, as applicable from said crops, or from said attachment and execution, was by him made and applied on the same.

“Judgment for the defendant for costs of suit.”

The only points to which our attention is called are the insufficiency of the evidence to justify the decision of the court, and that it is against law. Is not the decision against law? It is found by the court, that, “in the summer of 1876, Finch & Shinn were engaged as partners in farming in the county of Monterey, and rented from plaintiff, Sheehy, for that season, — acres of land. Then the wheat and barley that were grown on this place were partnership property. This was the grain that was levied on by the plaintiff, under the writ of attachment. This levy was made on the 24th of August, 1876. It is found that it (the levy) was made upon the interest of Finch & Shinn in the two parcels of land (Sheehy's and Rowe's), and the crop growing on the same; that Jackson's mortgage was executed on the 21st of August, 1876, and was forthwith properly recorded; that at the date of the execution of this mortgage, most of the grain was cut upon both places, and the greater part of it had been stacked; that Jackson, upon receiving the mortgage, went on both places and examined the crop, and placed a man in charge of the crop; that at the time of the levy of the attachment, parties representing Jackson were in possession and occupation of both fields, and the sheriff was by them informed that Jackson claimed an interest in these crops.

“It is averred in the complaint, and not denied in the answer, that judgment was recovered by plaintiff in the action of Sheehy against Finch & Shinn, on the 23rd of October, 1876, for \$864.65 ; that on this judgment a writ of execution was sued out, which came to the sheriff's hands on the 3rd of November, 1876. It is further found that it was agreed between the plaintiff, Sheehy, the sheriff, and Jackson, that the latter should thresh and sack the grain and deliver to the sheriff whatever belonged to the Shinn interest under the attachment.

“It appears from the findings, that Jackson did thresh and sack the crop, delivered none of the grain to the sheriff, but sold it himself and paid to the sheriff \$319, as the part belonging to the Shinn interest, which was applied by the sheriff upon the execution, leaving a balance of the judgment unsatisfied, amounting to \$582.50, with interest from the date of its rendition. The amount of grain threshed and sacked is found, but its value is not.

“It was the duty of the sheriff to have taken possession of the Shinn interest, and have sold it in the manner required by law. Jackson had no mortgage on the Shinn interest, and the sheriff should have looked after that interest, and taken possession of it when threshed and sacked, under the facts as found by the court. The sheriff had no right to sell at private sale, nor to authorize any one else to do so. (Code Civ. Proc. § 691–694.) His duty was to give notice of the sale of such property, by posting written notices thereof in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days. He is liable to a severe penalty for selling without such notice. He is required to sell to

the highest bidder at auction, between the hours of nine in the morning and five in the afternoon. 'When the sale is of personal property, capable of manual delivery (as in this case) it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price.' It makes no difference that Jackson obtained the highest price for the grain. He had no claim on it. The only figure it should have cut in the case, would be that the amount realized, when paid over to the plaintiff, might be allowed to go in reduction of damages. The conclusion of law drawn by the court was not a proper deduction from the facts found. The sheriff did not use due and proper diligence in executing the writ of execution in the Sheehy case, but, on the contrary, was in default. The default comes within the breach of the bond assigned, and the breach is fully made out by the testimony. The decision is against law, and the judgment and order should be reversed, and the cause remanded for a new trial.

"We have considered this case upon the findings of the court, and on these, as we have seen, the judgment and order must be reserved. But we are also of opinion that some of the findings on material matters are not sustained by the evidence.

"There was no evidence to sustain the finding that the plaintiff agreed with the sheriff and Jackson that the latter should thresh and sack the grain. It is clear from the testimony that the plaintiff had nothing to do with any such agreement.

"The evidence does not sustain the finding that at the date of the mortgage to Jackson most of the grain was cut on both the Rowe and Sheehy places, and the greater part of it had been stacked. The evidence

shows that all the grain had been cut and was in sheaf and stack. If it was not cut, it did not pass to Jackson under his mortgage by its terms, for that mortgage only transferred to Jackson 'all the wheat and barley now in sheafs and stacks, grown and raised the present season and now being' on the two places, describing them. If it was as found by the court, the default of the sheriff was greater, for it was his duty to take possession of that not cut—not in sheaf and stack.

"The case demands some other observations. If the crop raised on the Sheehy place was partnership property, what right had Jackson to take possession of it to the exclusion of Shinn, the partner from whom he had no mortgage? As against Jackson, who had a mortgage only of the interest of Finch, which interest could only be determined after a settlement of the accounts of the partnership, where it might have turned out that Shinn was entitled to the whole (Civil Code, § 2405), Shinn had a right to the possession, and under these circumstances it was the duty of the sheriff, having in his hands the execution against both the partners, to take possession of all the grain on the Sheehy place. Shinn could not be deprived of the possession of the whole by the assignment by his partner of his interest. The sheriff neglected his duty and was guilty of a breach of his bond as set forth in the complaint, in not taking possession of the whole grain, at least on the Sheehy place, as he was ordered to do. The judgment and order are reversed and cause remanded."

In an action against a sheriff for seizing and selling certain personal property, alleged to belong to plaintiff, under an execution against one Teal, it being averred

in the answer that the property belonged to Teal: *Held*, that evidence tending to prove that it was the partnership property of Teal and plaintiff was proper, and that if they were partners, and as such, owned the property, plaintiff could not recover. (Hughes v. Boring, sheriff, 16 Cal. 82.)

Partnership property can be seized under an execution against one of the partners, for his individual debt, and sold; but the interest which passes by the sale is only the interest of the debtor partner in the residuum of the partnership property, after the settlement of the partnership debts. (Robinson v. Tevis, 38 Cal. 611.)

Where V., an owner of land, makes a verbal agreement with B.—which they term a lease—by which B. is to have the land for three years; V. to furnish the farming implements, wagons, horses, and his share of sacks; B. to work the land, and give V. for the use of it one-third of the grain raised, after it is put in sacks, free from the expense of threshing: *Held*, that this agreement is not a lease, but a contract for working the farm upon shares, and that the parties are tenants in common of the grain, until a division be made. *Held, further*, that a sheriff having an attachment against V. may levy on his interest in the grain; and to effect this, may take and detain possession of the entire quantity of grain; but he can sell under the execution on the judgment that may be recovered in the action only the undivided one-third interest of V.—the purchaser at the sale becoming tenant in common with B. (Bernal v. Hovious, 17 Cal. 541.)

Where one partner *bona fide*, sold the partnership property to satisfy his individual indebtedness, and in an action of replevin by the purchaser against a creditor of

the firm who has attached the property, after the sale and delivery, as the firm property, and for a firm debt, the court properly rendered a judgment for the purchaser; and it will be presumed in support of the judgment, that the court below found it as a fact that the other partner consented to, and authorized the sale. (Stokes *v.* Stevens, 40 Cal. 391.) So long as the legal title of the partnership property remains in the co-partners, a creditor of the firm may pursue his remedy against it, in an action at law, in the same manner as against an individual debtor. But if the legal title has been conveyed to a third person *bona fide*, the creditor can pursue the property only by a bill in equity to marshal the assets and enforce his equitable lien.

The filing of a bill by one partner against his co-partners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. (Adams *v.* Woods, 9 Cal. 24.)

Idem. Funds in the hands of a receiver, in a suit for dissolution, are therefore subject to attachment at any time before a final decree of dissolution and distribution.

§ 203. **Garnishment and Demand.**—The method of serving a garnishment is explained elsewhere, under the title of garnishments. When a garnishment is served under an execution, a demand should be made upon the person served for the delivery to the sheriff of any money or other property belonging or owing to the

defendant, in the possession or under the control of the person served.

§ 204. **Assignee's Lien.**—A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. (Walling *v.* Miller, 15 Cal. 39.)

Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and one Coulter were two. While the dust was in the hands of defendants, Coulter sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of Coulter attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded Coulter's share of the coin: *Held*, that plaintiff was entitled to the coin; that the dust in defendant's hands was in the constructive possession of all the five owners. C. having no exclusive interest in any part until it was converted into coin, and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of purchaser or assignee; and after such order, neither C. nor his creditors could claim any right to the money; that the Statute of Frauds has no application to a case like this. (Walling *v.* Miller, 15 Cal. 39.)

§ 205. **How Writ is Executed.**—The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of

property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs. (§ 691, C. C. P.)

An execution will not justify breaking into a house. But after entrance has been lawfully effected, through an outside door, the officer may, for the purpose of levying upon property, break through inside doors to get at the property.

A levy made at any time before the return day of the writ is good, but a levy made after the return day will not be good, unless the delay has been caused by a stay of proceedings. Where property has been levied upon and there is not sufficient time between the date of the levy and the return day, the officer may, nevertheless, proceed to advertise and sell the property under the writ, and the sale will be valid.

When a stay of proceedings is ordered, the time of the stay is not to be computed as part of the time in which the writ runs to the return day. That is, if a writ is made returnable within sixty days, and a stay of proceedings is granted for twenty days, the writ will have eighty days to run before it must be returned.

The court has no power to make an order directing a sheriff to enforce an execution by levying on a particular piece of property. (*Fraser v. Thrift*, 50 Cal. 476.)

§ 206. **Penalty for Refusing to Levy.**—If the sheriff to whom a writ of execution is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon and sold, he is liable to the creditor for the value of such property. If he neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office (after deducting his legal fees), the amount thereof, with twenty-five per cent. damages and interest at the rate of ten per cent. per month from the time of demand, may be recovered by such person. (§§ 4180, 4181, Political Code.)

§ 207. **Senior and Junior Writs.**—When an officer has levied upon property, he may hold the same under subsequent writs that may come into his hands, so long as the first levy remains thereon. The receipt of subsequent writs operate as constructive levies upon the goods taken under the prior writ.

If a second execution be delivered to a sheriff after he has the defendant's goods in possession under the prior execution of another, the goods are bound by the second execution, subject to the first execution.

Where A. and B. issue separate executions, and both are levied upon the same property at different times, and the prior execution of A. is set aside, B. is entitled to be paid as if he were the sole execution creditor.

When a second execution is levied upon certain goods, and the proceeds afterwards exhausted by the first execution, the sheriff's return of *nulla bona* upon the second execution is proper.

Where there are several writs of attachment levied upon property, the first writ levied holds the property to satisfy the judgment that may be recovered under that writ; and when an execution is issued against the property, whether it be in the case of the first attachment, or in any other, the property may be sold under such execution; but under whatever execution the property be sold, the judgment under the first attachment must be satisfied first, and the proceeds of the sale must be held by the officer for that purpose until the judgment under the first attachment is rendered, or the case otherwise disposed of. The judgments under the senior writs of attachment are to be satisfied in the order in which they are levied.

In illustration of the order in which a number of writs in the hands of an officer must be given preference in the application of the proceeds of sale, the case of Egery & Hinckley, respondents, *v.* Buchanan and his sureties, appellants, 5 Cal. 59, is herewith given:

"On the 4th day of August, 1852, the respondents commenced an action by attachment, in the District Court of the Fourth District, against T. A. Thomas and others, and sent their writ of attachment to the county of El Dorado. On the 10th day of August, 1852, the writ of attachment was levied upon a quartz mill and machinery of the said Thomas and others, by Buchanan, one of the appellants, who was then the sheriff of said county. On the 18th day of January, 1853, judgment was recovered by the respondents against Thomas and others, for the sum of \$2345.96. On the

same day, a general execution was issued upon this judgment, and delivered to Buchanan. On the 18th March, 1853, Buchanan made a return of '*nulla bona*.' On the 30th of March, 1853, an *alias* execution was issued upon the judgment, and sent as the first; and on the 21st of April following, the same return was made as before.

“On the 9th of February, 1852, Nathan Harris commenced an action in the District Court of the Eleventh District, for the county of El Dorado, to enforce a mechanic's lien upon the property mentioned; and on the 28th of May, 1852, recovered a judgment against Thomas and others, for the sum of \$900 and costs, and on the 2d day of September, 1852, an execution was issued, directing the sale of the property to satisfy the judgment. On the 30th of October following, the property was sold under the said judgment, by Buchanan, for the sum of \$3000. The judgment in favor of Harris was satisfied out of the proceeds of the sale, and a balance of \$1897 remained in the hands of Buchanan.

“On the 12th day of August, 1852, B. F. Langford commenced an action in the District Court of the Eleventh District, for El Dorado county, against the same defendants, to enforce a mechanic's lien upon the same property for the sum of \$1200, and on the 10th of May, 1853, recovered judgment for the sum of \$1459, and costs, and directing the sale of the property to satisfy the amount of the judgment. An order of sale was issued upon the judgment, and placed in the hands of Buchanan. On the 13th of May, 1853, upon receipt of the order of sale, Buchanan applied the sum of \$1563.45 (this being the amount of Langford's judgment, with costs), of the

\$1897 before mentioned, to the payment of Langford's judgment and costs. There remained in his hands after this application, the sum of \$333.55, of the proceeds of sale under Harris' judgment.

"On the 11th day of August, 1852, A. L. Chilton commenced an action, by attachment, against Thomas and others, for \$4720, in the said District Court for El Dorado county, and on the same day the writ of attachment was levied by Buchanan, upon the property mentioned. On the 11th of May, 1853, judgment was rendered in favor of Chilton, for the sum of \$3368.50, and costs, and the judgment directed the sale of the attached property to satisfy the amount. On the 1st day of June, 1853, an order of sale was placed in the hands of Buchanan, in pursuance of this judgment, and on the 21st day of June, 1853, he applied the balance of the proceeds of sale under Harris' judgment, to-wit: the sum of \$333.55, to the payment of the judgment in favor of Chilton.

"The respondents, on the 7th of December, 1853, upon affidavit and motion, obtained a rule upon the appellants, from the District Court of the fourth district, for the county of San Francisco, to show cause why they should not pay to respondents the sum of \$2345.96, the amount of the judgment rendered in favor of respondents, with twenty-five per cent. damages, and interest at the rate of ten per cent. per month, from the 24th day of January, 1853. The appellant, Buchanan, appeared, and answered to the rule, and showed for cause the facts as they are above set forth. After hearing, the court made an order requiring Buchanan and his sureties to pay to the respondents the sum of \$1897.00, with twenty-five per cent. damages and interest, at the rate of ten per

cent per month, from the 24th day of January, 1853, to the time of the entry of judgment—amounting to \$6708.32, with costs. From this order this appeal is taken, and the judgment was reversed for the reason that the plaintiffs had mistaken their remedy. The plaintiffs were concluded by the return of the sheriff, and their action should have been for a false return. The sheriff should have applied the proceeds in the following order: 1st, Harris; 2d, Egery & Hinckley; 3d, Chilton; 4th, Langford.”

An attachment issued before the maturity of the debt, is *prima facie* void as against a subsequent attachment. But where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought. The debt in such case is equitably due, and there being no actual fraud against subsequent creditors, they can not be preferred in equity, even if the suit could have been defeated by the debtor himself. (Patrick *v.* Montandor, 13 Cal. 435.)

Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered. Such a fund is not strictly an equitable asset. The prior attachments became liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. Plaintiff's costs, disbursements, and counsel fees, however, should first be deducted from the fund before distribution. *Idem.*

§ 208. **How the Sheriff should apply Money on Execution.**—When a sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. Where there are several attachments, and the officer receives notice that the senior attachment is defective, he should make inquiry therein and satisfy himself that he can safely pay the money upon such senior attachment. For, if he pay over money upon a void writ, he will be responsible to the plaintiffs under the junior writs, notwithstanding the fact he may urge in excuse, that, the senior writ was regular upon its face. It is held in *McComb v. Reed*, 28 Cal. 281, that the sheriff has no right to go back of the process and raise the question as to the validity of the attachments. In *Buffandeau v. Edmondson*, 17 Cal. 441, the court say ; “It is no part of the sheriff’s duty to sit in judgment upon official acts and reform the errors or revise the orders of a judge.” Yet, while a sheriff may not question the validity of a writ, he is bound to protect himself from loss sought to be put upon him while in the faithful discharge of his duties.

In an action on a sheriff’s bond, in the case of *McComb v. Reed*, 28 Cal. 281, judgment was rendered against the officer and his sureties for not applying moneys received under execution upon plaintiff’s judgment. There were two writs of attachment, under which the property taken, and the money realized from the sale was applied on the junior writ. The reason assigned by the sheriff was, that the complaint which was served with the summons in the first case did not set up a cause of action which would warrant the issuance of an attachment. The court held, notwithstanding, that the writ was not void. The presumption is,

that the sheriff was led to believe that the writ was voidable. For a writ may be not void and yet be voidable. The validity of the writ being established, the sheriff, of course, was liable.

A sheriff who receives an attachment, regular on its face, cannot pay over the money obtained by him from the sale of property levied on by virtue of the writ to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue. *Idem.*

It is not only a frequently quoted principle of law, but a statutory enactment (§ 4187, Political Code), that "a sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face, and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued."

However bright and clear the protective halo of light that is shed upon the officer's pathway in this broad and unambiguously worded declaration, officers frequently stumble into difficulties by serving process regular on their face, and issued by courts of competent authority. For it is an equally settled principle that no person can be divested of his rights, except by due process of law; and officers are often called upon to carry out the judgments of courts under the authority of writs regular on their face, which have been wrongfully issued.

In the case of *McComb v. Reed*, the officer was unquestionably at fault in applying the money upon the junior writ. It was an expensive lesson in law to him. The senior writ having been declared valid, it was doubtless some gratification to him to learn from

the following remarks by the court, what his precise line of conduct should have been to enable him to avoid the pitfall he so unfortunately fell into :

“The subsequent attachment of Fleishman varied neither the rights nor the duties of the sheriff, as above stated. He was but a ministerial officer before the second attachment was made, and the making of it did not vary the extent nor the quality of his powers. The plaintiff's attachment and execution were all final documents as to the sheriff. He had no right, when he received Fleishman's attachment, to go back of that process and raise the question of its validity upon the pleadings in the action in which it was issued, nor was he at liberty to concern himself with that question when he received Fleishman's execution. The rule of official duty in the matter of the plaintiff's process was the same. When the sheriff received the respective executions, it was his duty to apply the money in the order of the attachments as required by law. Had he done so, his ministerial duties would have been fulfilled, and he would have been protected against all attacks that might have been made upon him at the suit of Fleishman. If Fleishman had the better right, it was his business to move in the matter in person, and in one of the alternative modes pointed out in *Speyer v. Ihmels*, 21 Cal. 287.”

In the case of *Speyer v. Ihmels*, 21 Cal. 286, the court decided as follows: “This is a case arising under the provisions of the Civil Practice Act, relative to interventions. (See § 387, C. C. P.) On the 10th of January, 1861, the plaintiff commenced his action, and caused an attachment to be levied upon the property of Ihmels & Co. On the same day, Eggers & Co. commenced an action against the same defendants,

and caused an attachment to be levied upon the same property, but subsequent to the plaintiff's levy, and in due course obtained judgment. On the day previous, E. L. Goldstein had commenced an action against the same defendants, and caused an attachment to be levied upon the same property, but also subsequent to the plaintiff's levy. Before a default was entered against the defendants in this action, E. L. Goldstein and Eggers & Co. severally filed interventions, setting forth these facts, and also averring that the property attached was only sufficient to satisfy the plaintiff's claim, and also charging that the plaintiff's demand was not due at the time he commenced his action, and also that he had no valid demand against the defendants, and that his action was prosecuted for the purpose of hindering and defrauding creditors of the defendant. A general demurrer was interposed to these complaints of intervention; that is, that the facts set forth do not constitute a cause of intervention. The demurrer was overruled, and then the plaintiff answered the interventions; and upon the action coming on for trial, after the intervenors had made proof of their attachment proceedings, and the plaintiff had shown the default of the original defendants, each party moved the court for judgment in his favor, without giving further evidence, and thereupon the court found in favor of the plaintiff against the defendants, and in favor of the intervenors against the plaintiff, and adjudged that the plaintiff recover the amount of his demand against the defendants, and that his attachments be set aside, and that the sheriff pay over the money in his hands to the intervenors *pro rata*. From this judgment the plaintiff appeals. The two main points are: 1st, Whether the facts show a case for a

proceeding by intervention; and, 2d, Whether the *onus probandi* was on the plaintiff to prove his cause of action as between him and the intervenors, or on the intervenors to prove their cause of action against the plaintiff. The provisions of the Practice Act, relating to interventions, were not a portion of the system of proceedings in civil cases as originally enacted, but were adopted in 1854 from the laws of Louisiana. In a case like the present, before the introduction of these provisions, and as doubtless may still be done, the proceedings would have been by a separate action in the nature of a bill in chancery, as in the case of *Heyneman v. Dannenberg*, 6 Cal. 376, or by motion to the court, as in the case of *Dixey v. Pollock*, 8 *Id.* 570. But in the case of *Davis v. Eppinger*, 8 *Id.* 378, where the facts were like those in this case, it was decided to be a proper case for intervention. Although the intervenors have not a claim to or lien upon any property which is the direct subject of litigation in this action, they have a lien upon property which is held subject to the results of the litigation, and which would be lost to the intervenors if the original action should proceed to judgment and execution. If the case does not fall within the precise definition of the cases in which intervention takes place, as given in § 659, and as explained in the case of *Horn v. Volcano Water Works*, 13 Cal. 62, it is substantially within the object provided for by that section, and as that is a law only regulating modes of procedure, and not affecting rights of property, we think the interpretation given to it in the case of *Davis v. Eppinger* should not be changed. * * *

* * * The objection that the judgment should not have directed the money in the sheriff's hands to

be paid to the intervenors *pro rata*, cannot avail the appellant, because it is a matter in which he is not interested, and those who are interested in it have not appealed. But the judgment having been rendered for the plaintiff against the original defendants, that portion of the judgment which sets aside the plaintiff's attachment absolutely was erroneous. It should only have been postponed to those of the intervenors. In this respect the judgment must be modified."

The sheriff, Gorham, levied an attachment on the ship Underwriter in the case of Gilson *v.* Meiggs; and afterwards levied an attachment in the case of Dallas *v.* Meiggs on the same property. One Davidson claimed the vessel, and the sheriff took an indemnity bond from both Gilson and Dallas, each for the full value of the property attached.

As the property could not be divided, he was compelled to seize and detain it entire, under both attachments. The seizure under Gilson's attachment being prior in point of time, was absolute, and that under Dallas' attachment, being subsequent, was subject to the first. As the sheriff could not foresee whose levy would ultimately prevail, it was his right and his duty to take full indemnity from each, so that he would be secure in any event.

Some days after the attachments were levied, Davidson sued Gorham for the seizure of the vessel, and on the 16th of January, 1855, recovered judgment against him for \$85,000. The sheriff did not pay this judgment, but assigned to Davidson the bond of indemnity given by Dallas. Davidson brought suit upon this bond, against Dallas and his sureties, for the full penalty of the bond, namely, \$100,000, and they appealed.

Gilson obtained judgment against Meiggs, upon which execution issued September 29th, 1855, for \$38,517.12, under which the vessel was sold by the sheriff Oct. 8, 1855, for \$35,000 and the proceeds paid to Gilson.

In the case of Davidson against Dallas and his sureties, on appeal, the Supreme Court says: "In detaining the vessel under each attachment, the sheriff acted as the agent of both Gilson and Dallas; but his agency for Gilson was primary; while it was secondary for Dallas. It was conditional as to both. If the sheriff ultimately incurred no liability, he could recover nothing. And if he did incur liability, must he not recover in the order in which he levied? And of each plaintiff, in proportion to the liability ultimately incurred *for him*. The ultimate liability of the indemnitors was not fixed by the execution of the bonds, but depended upon subsequent events; and as both the fact of liability at all, and also its amount, were dependent upon subsequent events, why should not the fact, as to which plaintiff should be liable, and in what proportion, and in what order, be equally dependent upon the result of the proceedings in the two attachment-suits? If the sheriff did his duty in taking full indemnity from each creditor (and if he did not, it was his own error,) then he was protected in any event. If the attachment of Gilson was defeated, and that of Dallas sustained, then Dallas would be held as the *sole* attaching creditor, and be subject to the ultimate sole liability."

From the principles of the cases referred to, and the provisions of our Practice Act, these conclusions would seem to follow:

1. If the attachments were ultimately sustained,

and the whole proceeds of the property absorbed by the debt of Gilson, then he would have been solely responsible to the sheriff for the entire liability incurred by him to Davidson.

2. If the levy of Gilson had been defeated, and that of Dallas sustained, then Dallas would have been solely responsible for the entire amount.

3. If both attachments had been sustained, and the property sold for more than sufficient to pay Gilson, then Gilson and Dallas would have been responsible in proportion to the amounts paid to each by the sheriff.

4. If both the attachments had been defeated by Meiggs, or if the suits of Gorham against the indemnitors had been commenced before the determination of the attachment suits against Meiggs, then the separate responsibility of Gilson and Dallas would have been in proportion to the amounts of their respective attachments, except in case the whole amount for which both attachments were levied, had exceeded the value of the property as settled in the suit against the sheriff, in which case the prior attaching creditor would have been responsible to the amount of his attachment, and the subsequent attaching creditor for the remainder.

The judgment of the court below should be reversed, a new trial ordered, and the cause remanded for further proceedings.

Upon a re-hearing, at a subsequent term, the Supreme Court affirmed its above decision, and remarked: "If Gilson had refused to indemnify, and Dallas had done so, then the sheriff should have released the levy of Gilson, and Dallas would have shared all the responsibility and all the benefit. And

the same rule would apply to any subsequent creditor who refused to indemnify." (Davidson *v.* Dallas, 8 Cal. 227.)

In 7 Cal. 142, there is reported the case of one Graham *v.* Endicott, and his sureties on his bond as sheriff of Nevada county, for refusing to pay over certain moneys collected by him before the expiration of his term of office. The facts set up in the complaint against the defendants in the court below, are substantially as follows: "Endicott, while sheriff, levied certain attachments upon the property of Adams & Co., the proceeds of which were more than sufficient to satisfy the claims of the attaching creditors, leaving a balance in his hands. After the expiration of his term of office, the plaintiff, Graham, recovered judgment against Adams & Co., attached the money remaining in Endicott's hands, and now seeks to make him and his sureties officially liable for the same. Defendant demurred, the demurrer was sustained, and on appeal to the Supreme Court, the judgment was affirmed, the court holding that there was no relation between Graham and Endicott that would render him officially liable. Although responsible to Adams & Co., he was so far as Graham was concerned, a mere bailee of Adams & Co., and could only be garnisheed as a private individual. It was not denied, on the part of the ex-sheriff, that the liability of a sheriff or other ministerial officer may continue after his term of office has expired, in respect to such matters as come into his hands during his term. The defendant could only be garnisheed as a private individual."

One court cannot enjoin the process of another court of co-ordinate jurisdiction, much less seize the proceeds of such process. By repeated decisions of

the Supreme Court of this State, this has become an established principle of law. (*Rickett v. Johnson*, 8 Cal. 34; *Revalk v. Kroeman*, *Id.* 66; *Chipman v. Hibbard*, *Id.* 268; *Phelan v. Smith*, *Id.* 520; *Anthony v. Dunlap*, *Id.* 26; *Uhlfelden v. Levy*, 9 Cal. 607; *Weaver v. Wood*, 49 Cal. 300.) If two attachments, issued out of different courts, at different times, are placed in a sheriff's hands, and both are levied on the same personal property, and the court out of which the latest attachment issues, orders the property sold and the proceeds deposited with its clerk, and the sheriff obeys, and the money is paid to the second attaching creditor, the sheriff is liable to the first attaching creditor for the amount for which he recovers judgment, or for the amount of the proceeds, if less than the amount of the judgment. The court from which the second attachment issues may make an order of sale of the property, but it has no power to dispose of the fund arising from the sale, other than the surplus remaining after the claim of the first attaching creditor is satisfied. In the case of *Weaver v. Wood*, the sheriff of Solano County had two attachments issued out of different courts, and by order of the court from which the second attachment issued, sold the property and paid the money into the court, from which it was paid to the plaintiff in the second attachment. As a consequence, the sheriff was compelled to satisfy the first attachment out of his own pocket. On appeal, the Supreme Court decided that the sheriff, having both attachments in his hands, knew the extent of the demand of the first attaching creditor, and must be held to have known that the Fourth District Court could only deal with the excess of the proceeds of the sale over that demand.

* * * * *

An officer is not liable for contempt in refusing to pay money into court on a void order. The case of *Brown et al.*, petitioners, *v.* Moore, judge, etc., respondent, reported in the Pacific Coast Law Journal, October 14, 1882, is an application for a writ prohibiting the respondent from proceeding further in the matter of certain contempt proceedings against the petitioners. From the verified petition, it appears that during the month of April, 1882, sundry suits at law were commenced by divers persons, against one Bartlett, in the Justices' Courts of Amador county, to recover certain moneys alleged to be due from Bartlett to the respective plaintiffs in those suits. Judgment passed for the plaintiffs therein, on which executions were issued and placed in the hands of the petitioners in the present proceedings, who are constables in and for the respective towns of Amador county, in which are established the Justices' Courts that rendered the judgments. The executions thus issued and delivered to the petitioners were by them, as such constables, levied on certain personal property of Bartlett. On the 22d of May, 1882, a judgment was entered in the Superior Court of Amador county against Bartlett and in favor of one Post, for a money demand; and on this judgment execution was issued on the same day and delivered to the sheriff of Amador county. The sheriff, on the 24th of May following, levied his writ by delivering to each of the constables (petitioners here) a copy of the same, together with a notice that all the property of the defendant (Bartlett) in their possession and under their control was attached in pursuance of such execution, and demanded of them the possession of the property. The constables refused to deliver the property to the sheriff, and the

next day the latter returned the writ to the Superior Court, stating in his return, substantially, the facts as above given. On the 27th of May, on an affidavit made on behalf of Post, setting forth that the judgments rendered by the Justices' Court were void, the judge of the Superior Court made an order directing the constables to appear before him on the 29th of the same month and show cause why they should not surrender the property to the sheriff. On the day named they appeared and filed their several affidavits, declaring that they were not debtors of Bartlett's, nor had they any property of his other than that levied on and held by them under and by virtue of the executions first above mentioned. Thereupon, the judge refused to direct the constables to deliver the property to the sheriff, but on the same day entered an order in the following words: "It is ordered, adjudged and decreed that plaintiff herein (Post) is authorized to institute an action against each of said persons, to wit: C. L. French, constable, H. B. Templeton, constable, W. H. Brown, constable, and W. Payton, his deputy constable, to determine whether or not the said persons hold and retain said property adversely to the defendant—said suits to be commenced within thirty days from the date of this order. And it is further ordered that each of said constables is given leave to sell the said property in their possession belonging to said defendant under the alleged executions in their hands, and they, and each of said constables is ordered to pay all the proceeds of said sales of property to the clerk of the court within ten days after the sale thereof."

A motion was subsequently made on behalf of the constables that that portion of the order of May 29th, purporting to authorize them to sell the property in

their possession under the writs of execution in their hands, and requiring them to pay the proceeds of such sales to the clerk of the Superior Court, be set aside on the ground that the court had exceeded its jurisdiction in so ordering.

This motion was denied.

The constables sold the property under and by virtue of the executions held by them, and applied the proceeds to their satisfaction, instead of paying them to the clerk of the Superior Court, as directed by the order of May 29th; and upon these facts being brought to the notice of the Superior Court, that court made an order to the effect that the constables be brought before the court at a time stated, and show cause why they should not be adjudged guilty of contempt of court in failing and refusing to pay the proceeds of the sales of the property to the clerk, and further directing a warrant of attachment to be issued and delivered to the sheriff, commanding him forthwith to arrest the constables and hold them in his custody, unless they should execute an undertaking in the sum of \$100 each for their appearance on the day named.

The Superior Court, in making the orders complained of by the petitioners, was proceeding under the supposed authority of §§ 717 and 720 of the Code of Civil Procedure. Even if it be admitted that those sections have any application to an officer holding property of a judgment debtor by virtue of a legal process issued against him, neither of them confers on the court the power to order such property sold, nor to direct that the proceeds of it be paid to the clerk of the court. (*Hartman v. Olvera*, 51 Cal. 501.) The Superior Court, therefore, exceeded its power in

making the order requiring the petitioners to pay to the clerk of the Superior Court the proceeds of the property sold under the executions held by them against Bartlett. For the disobedience of that void order, the petitioners could not be lawfully punished for contempt. The proceedings looking to that end should, therefore, be arrested. (*Williams v. Dwinelle*, 51 Cal. 422; *Quimbo Appo v. The People*, 20 N. Y. 531.)

Demurrer overruled.

We concur: McKinstry, J., Sharpstein, J., Morrison, C. J., McKee, J., Thornton, J.

The application of an attaching creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. (*Dixey v. Pollock*, 8 Cal. 543.)

§ 209. **Preferred Labor Claims.**—In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services

rendered within the sixty days next preceding the levy of the writ, not exceeding \$100. If any or all of the claims so presented, and claiming preference under this section, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim. (§ 1206, Code Civil Procedure.)

The following section was added to the code and approved March 7th, 1883: "The debtor or creditor intending to dispute a claim presented under the provisions of the last section (1206) shall, within ten days after receiving notice of such claim, serve upon the claimant and the officer executing the writ, a statement, in writing, verified by the oath of the debtor, or the person disputing such claim, setting forth that no part of said claim, or not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the sixty days next preceding the levy of the writ. If the claimant bring suit on a claim which is disputed in part only, and fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him."

The constitutionality of § 1206 of the Code of Civil Procedure, which provides for giving preference to

labor claims out of moneys received on execution, is affirmed by the Supreme Court, in the case of *Mohle v. Tschirch*, the opinion in which case was filed May 11th, 1883.

§ 210. Levy and Sale of Personal Property.—
The levy upon personal property under a writ of execution is made in the same manner as under the writ of attachment. A special inventory of the articles to be sold should be prepared so that confusion may be avoided when the sale takes place. A large stock of goods sold in parcels cannot well be disposed of at a public sale where there are many bidders present without such an inventory and pre-arranged method of conducting the sale. No sale should be held except in conformity to § 692 of the Code of Civil Procedure, which provides that before the sale of property on execution, notice thereof must be given by posting written (or printed) notice of the time and place of sale in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days. The notices must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. If the writ does not specify in the judgment the kind of money, the sale should be made for "lawful money of the United States."

§ 211. Penalty for Selling without Notice.—
An officer selling without such notice forfeits \$500 to the aggrieved party, in addition to his actual damages. This does not apply to the purchaser at such sale. Such purchaser is not the "aggrieved party" within

the meaning of the law. The parties to the execution are the "aggrieved parties." (*Kelly v. Desmond*, decision filed June 15, 1883.) The remedy against a sheriff for selling property on insufficient notice is confined to the statutory remedy. (*Smith v. Randall*, 6 Cal. 47, affirmed.) [17 Cal. 626 ; also cited as authority in *Satterlee v. San Francisco*, 23 Cal. 320 ; and see *Herzo v. San Francisco*, 33 Cal. 140.] The statute provides an adequate remedy in such cases by an action against the officer, and the party aggrieved is entitled to no other remedy. In computing the time of giving notice of the sale, the day on which the sale is made should be excluded.

§ 212. **When Sale should be Postponed.**—At sales held by a sheriff or constable, where bids are made that are palpably disproportioned to the value of the property, the officer should adjourn the sale. Where it is real property, the officer may be unable to judge of the sufficiency of the bid, for the reason that the property may be covered with mortgages. But in the case of personal property, an approximate estimate of its value may be arrived at by the officer. Inadequacy of price alone is sufficient to authorize a court to set aside a sale. A sale should be postponed where there are indications on the part of bidders of collusion to depreciate the sale to an unreasonable extent ; or when the officer has reason to believe that he can realize more by a sale at a future day.

§ 213. **The Title the Purchaser Secures.**—A sale of personal property passes to the purchaser only such title as the vendor had.

§ 214. **When Sheriff may Levy on Realty instead of Personal Property.**—The sheriff may, on the request of the defendant in execution, properly levy on real estate, though there be personal property present amply sufficient to satisfy the execution. (*Smith v. Randall*, 6 Cal. 52.) The request should be in writing.

§ 215. **Seizure and Sale of Promissory Note.**—A promissory note, being the property of the defendant in an attachment and execution, was held, in the case of *Davis v. Mitchell*, 34 Cal. 81, to be liable to seizure and sale, and the purchaser takes it, when delivered to him, upon the same terms as if it had come to his hands in the ordinary course of business. Whether, in such case, the sale will be valid without a delivery of the note to the purchaser, is discussed in the decision, but not decided.

§ 216. **Preventing Bidding at Sheriff's Sale.**—An agreement between a judgment creditor and one claiming an interest in the thing about to be sold under an execution against a third person, that neither shall bid against the other, but that the claimant shall and may buy in the property, is held in *Packard v. Bird*, 40 Cal. 379, to be void, as contrary to public policy.

§ 217. **How Sale should be Conducted.**—All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. (§ 694, C. C. P.) If the sale cannot be completed in one day, it may be postponed until the next day without posting notices of the postponement, if there are per-

sons present to receive the proclamation of the postponement.

After sufficient property has been sold to satisfy the execution, no more can be sold under that writ. Neither the officer holding the sale, nor his deputy, can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price. The judgment debtor, if present at the sale, may direct the order in which property shall be sold, when such property consists of several lots or parcels, or of articles which can to advantage be sold separately, and the sheriff must follow such directions.

§ 218. Re-sale where Bidder Refuses to Pay.—If the purchaser refuse to pay the amount bid by him for property struck off to him, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. If the amount of such loss is under \$300, an action may be commenced in a Justice's Court; if over that amount, in the Superior Court. When the purchaser refuses to pay, the officer may in his discretion, thereafter reject any subsequent bid of such person. (§§ 695, 696, C. C. P.)

§ 219. Judgment Payable in Money.—A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, indorses it on the execution

and then returns it satisfied, the return is not conclusive, and, perhaps, not *prima facie* evidence of satisfaction, unless it shows some authority for receiving the note. (Mitchell v. Hackett, 14 Cal. 661.)

§ 220. **Purchaser Entitled to Certificate of Sale.**—When the purchaser of any personal property, capable of manual delivery, pays the purchase-money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied. If the sale is of personal property not capable of manual delivery, the officer, on receipt of the purchase-money, must execute and deliver to the purchaser a certificate of sale, and such certificate conveys all the right which the debtor had in such property on the day the execution or attachment was levied. (§§ 698, 699, C. C. P.)

A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate. (Lay v. Neville, 25 Cal. 546.)

§ 221. **Sale of Choses in Action.**—Wherever choses in action are liable to levy and sale, they must be in possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest (where it is a contingent and complicated contract) and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. In the case of Crandall

v. Blen, 13 Cal. 20, the sheriff levied by garnishment upon a written contract or agreement, but did not take any property into possession. Notices were posted and sale had and the agreement was struck off to the plaintiff. The agreement was not present at the sale, nor fully explained to the bystanders. The court held that no title whatever passed by the sale.

§ 222. **Effect of Quashing an Execution.**—Upon the quashing of an execution, the officer is bound to return the property levied upon to the defendant unless he have other writs in hand. In the case of *Wellington v. Sedgwick*, 12 Cal. 470, the defendant, as sheriff, having an execution against Stevens & Markley, levied it upon certain goods, the property of Stevens & Markley, and placed them in the hands of Wellington, as keeper, and subsequently the execution was quashed, having been issued without seal; and between that time and the issue and levy of a new execution, Wellington, who still remained in possession of the goods, purchased the goods of Stevens & Markley. The court held that such purchase was valid, and vested the property in Wellington. Upon the levy of the execution, the property vested in the sheriff for certain purposes; his title was only a qualified title, which was defeated by the quashing of the execution. The title then returned to Stevens and Markley; they could discharge the sheriff from the duty of returning the property to them, which they did by the sale to Wellington.

§ 223. **Attachments of Vessels.**—The attachment of a vessel differs in method very little from a levy upon other kinds of personal property. The writ

must be directed to the sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged in due course of law. The sheriff must execute the writ without delay, and must attach and keep in his custody the steamer, vessel, or boat named therein, with its tackle, apparel and furniture; but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such vessel, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board. The attachment may be released upon the usual undertaking (§§ 819, 820, 822, C. C. P.), if there are no claims for wages against the vessel. See § 825, C. C. P.

§ 224. **Sale of Vessels and Payment of Proceeds.**—When an attachment has been levied upon a steamer, vessel, or boat, and the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel, or boat, with its tackle, apparel, and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:

- 1. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution;

2. To the payment of the judgment and costs, including his fees;

3. He must pay any balance remaining to the owner, or the master, agent, or consignee, who may have appeared on behalf of the owner, or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto. (§ 824, C. C. P.)

No attachment upon a vessel can be discharged upon filing an undertaking for its release, after a claim has been duly filed for wages against the vessel, as provided in §§ 825 and 826 of the Code of Civil Procedure. The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition. (§ 827, C. C. P.)

The only preference given over the judgment creditor, in execution sales of vessels, is in the case of claims for wages of mariners, boatmen, and others employed in the service of the vessel, which must be first paid, and § 329, Practice Act, shows how such privileged claimants shall intervene for their interest in the proceeds. (*Fisher v. White*, 8 Cal. p. 401.)

CHAPTER IX.

EXECUTION—LEVY UPON REAL PROPERTY.

- § 225. Levy upon Real Property.
- § 226. Interests in Land Attachable.
- § 227. Notices of Sale.
- § 228. Sale Without Notice.
- § 229. When Party not Aggrieved Without Notice.
- § 230. Setting Aside Sheriff's Sale.
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- § 234. Purchaser at Sheriff's Sale.
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- § 250. When Owner is Estopped from Asserting Title.
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- § 252. Cloud on Title.
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- § 257. Sale of Homestead.
- § 258. When Judgment not a Lien.
- § 259. Judgment no Lien on Homestead.
- § 260. Return of Writ.

§ 225. **Levy upon Real Property.**—In levying upon real property, the same method is followed as that under the writ of attachment, viz.: By filing with the county recorder, etc. The officer levies upon the interest of the debtor in the property. If it turn out that the debtor had no interest therein, no property is acquired thereby. The notice of levy, notice of sale, the certificate of sale given to the purchaser, and the deed which follows after the expiration of the time for redemption, should recite that it is the interest of the debtor which is affected by the several proceedings.

Real property and any interest therein belonging to the defendant may be attached.

§ 226. **Interests in Land Attachable.**—The term “land” embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract—those which are executory as well as those which are executed; any interest, therefore, in land, legal or equitable, is subject to attachment or execution. The interest of a person who holds a contract to purchase land may be levied upon and sold. For example: F., holding a contract to purchase land from G., his interest was sold under execution and purchased by the intervenor, who, after receiving his deed, in due time

tendered the balance of the purchase money to G. and demanded a deed. G. refused to receive the money or to make the deed, and in execution of his contract, conveyed the land to the wife of F. and to E. F., the wife of one of the plaintiffs—to whom, also, a tender of the money and a demand for a deed was made by the intervenor. Afterward, E. F. conveyed to F. and his wife, and they executed a mortgage to the plaintiffs to secure the consideration for the conveyance: *Held*, in *Fish v. Fowlie*, 58 Cal. 373, in an action for foreclosure, that the intervenor, upon paying into court—to be applied to the payment of the mortgage debt—the amount of the principal and interest due to the defendants for the purchase money paid under the contract of sale, was entitled to a cancellation of the mortgage.

§ 227. **Notice of Sale Under Execution.**—Before the sale of real property under a writ of execution, notice thereof must be given as follows: By posting written notice of time and place of sale, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the notices of sale must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. Where no kind of money is specified, the sale should be made for “lawful money of the United States.”

§ 228. **Sale Without Notice.**—§ 692, Code of Civil Procedure, prescribes the manner in which notice of sale must be given, and § 693 provides that “an officer selling without the notice prescribed by the last section, forfeits \$500 to the aggrieved party, in addition to his actual damages.”

An action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. (*Askew v. Ebberts, et al.*, 22 Cal. 263.) If the attempted sale is a nullity and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues. In the case here referred to, plaintiff brought an action upon a constable's bond, executed by the defendant Ebberts as principal and the other defendants as sureties, to recover the sum of \$500, the penalty or forfeiture prescribed by statute. A judgment had been rendered against the appellant, an execution issued thereon which came to the hands of Ebberts, as constable, for service. He levied the execution upon a mining claim, advertised it for sale, and sold it to one Felton for \$25. The purchaser did not pay the bid, nor was any certificate issued therefor. The constable, finding that the sale had not been advertised the length of time required by the statute, advertised it again for sale, giving the proper length of notice, and sold the property at such second sale for \$206. The court held that unless the sale was perfected by a transfer of title, the debtor had suffered no injury, and was not “aggrieved” within the intent and meaning of the statute. There was no “sale” of the property under the defective notice.

the smaller parcel claimed by the judgment debtor. (*Logan v. Hale*, 42 Cal. 645.)

A sale in mass, of real estate consisting of several known and distinct parcels, at a price greatly below the actual value of the property cannot be sustained against the objection of the judgment debtor. Such sales are not absolutely void, but are voidable, and will be set aside upon reasonable and proper application, when there is reasonable ground for belief that they were less beneficial to the creditor or debtor than they would have been had a different mode been pursued. (*City and County of San Francisco v. Pixley, et al.*, 21 Cal. 57.) In the case just cited, the sheriff sold a tract of land belonging to the corporation, one mile in length and half a mile in width, which had, long previous to the sale, been laid out into blocks and streets, and marked upon the official map, and sold the same in mass, for \$360, while the actual value was \$75,000. The sale was set aside on account of the manner in which it had been made.

Such sales are against the express direction of the statute. Many persons might be disposed to bid for separate parcels of a particular tract, who have neither the wish nor the means to acquire the whole tract.

If a sheriff, by virtue of an execution, levies on and advertises for sale separate tracts of land, he must sell the tracts separately and not in mass. If he sell in mass, the defendant has his remedy by motion to set aside the sale on notice to the judgment creditor, sheriff, and purchaser at the sale. To uphold a sale in mass would be to deprive the judgment debtor of his right to redeem any one of the separate parcels. § 694 of the Code of Civil Procedure makes it mandatory on the officer to sell real property separately

where it is in several known lots or parcels. Frequently, at sheriff's sales, property consisting of separate parcels are sold in mass by agreement of the plaintiff and defendant in the execution, and where such sales are made, the defendant is estopped from complaining. It is not always a safe plan to pursue, however, as the judgment debtor in the execution may have other creditors who would be injured by such a course.

A sale of real property in mass is therefore *voidable*, and will be set aside upon a proper application of the judgment debtor, when made in reasonable time after the sale. Such a sale, however, is not *void*, and will not be set aside if the application is not made within a reasonable time. It was held, in *Vigoureux v. Murphy*, 54 Cal. 346, that where in such a case the application to avoid the sale was made more than three years after the sale, by a cross-complaint to an action of ejectment brought by the successor of the purchaser—that the application came too late, though the sale should have been vacated had the application been made immediately on the return by the sheriff, and *perhaps* if it had been made within the time allowed for redemption. A sale in mass, at a price greatly below the actual value of the property, cannot be sustained against the objection of the judgment debtor. In *San Francisco v. Pixley*, 21 Cal. 57, and *Page v. Randall*, 6 *Id.* 32, it is declared that such sales are not *void*, but are *voidable*, and will be set aside upon a proper application by the judgment debtor, when made in a reasonable time after such sale, where there is ground in reason for belief that it was less beneficial to the judgment creditor or debtor than it would have been had the sale been made of the separate parcels.

Where the land sold under execution consisted of separate but adjoining tracts, but the sheriff and purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff of the fact, or to direct a sale by parcels: *Held*, that the sale of the land, in gross, was valid. (Smith *v.* Randall, 6 Cal. 57.)

§ 234. **Purchaser at Sheriff's Sale.**—In an action against a purchaser at sheriff's sale, for not paying the amount of his bid, it cannot be set up in defense, that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the sheriff. (Harvey *v.* Fisk, 9 Cal. 94.)

§ 235. **Title Under Sheriff's Certificate of Sale.**—The purchaser of real property at a sheriff's sale, who receives the sheriff's certificate of purchase, has not a title to the property, but a lien on the same. (Baber *v.* McClellan, 30 Cal. 136.) The effect of such certificate is spent when the defendant in the judgment redeems.

§ 236. **Sheriff's Sales not Credit Sales.**—A purchaser at a sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole of the purchase money. A sheriff, by our laws, in selling property under execution, is not bound to receive any bid, except for cash on the whole amount of the sale; and having received a bid with but a portion of the purchase money paid at the time, he may disregard the bid, and offer the property again for sale, if the balance of the purchase money is not paid before the return

day of the execution. A sheriff is not bound to demand the purchase money before setting aside the bid, but the delay of the purchaser until the return day of the execution to pay the balance due, will be construed into a refusal on his part to pay the amount of his bid upon the property. (People *v.* Hays, 5 Cal. 74.)

§ 237. **Relief of Purchaser.**—Where a party purchased real estate at an execution sale upon the faith of the representations of the judgment creditor, that his judgment was the first on the property, when, in fact, there were prior incumbrances on it of more than its value: *Held*, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. It makes no difference whether the misrepresentations were made wilfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. Ordinarily, the maxim of *caveat emptor* applies to judicial sales, but it has many limitations and exceptions. (Webster *v.* Haworth, 8 Cal. 21.)

In a proceeding by motion under § 695, C. C. P., to compel payment by a delinquent purchaser at judicial sale, the statement of the sheriff upon which the motion is based, need not state in terms that "loss was occasioned" by a failure to pay the amount bid. It is not necessary to use the precise language of the statute. An averment of the amount bid and a re-sale at a specified smaller amount is sufficient. (Johns *v.* Trick, 22 Cal. 512.)

§ 238. **Insufficient Notice no Defense.**—In an action against a purchaser at sheriff's sale for not

paying the amount of his bid, it cannot be set up in his defense that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the sheriff. (*Harvey v. Fisk*, 9 Cal. 93.)

§ 239. **Relief in Discretion of the Court.**—The nature and extent of the relief in such case are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a re-sale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply; and from such, courts of equity seldom relieve. (*Goodenow v. Ewer*, 16 Cal. 461.)

§ 240. **When cannot Recover Amount of Bid.**—*Held*, also, that plaintiffs cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentations, undue influence, or misplaced confidence. *Id.*

§ 241. **Where Misrepresentation was Used.**—

Where a party purchased real estate at an execution sale, upon the faith of the representations of the judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it more than its value: *Held*, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. (*Webster v. Haworth*, 8 Cal. 21.)

§ 242. **The Doctrine of Caveat Emptor** applies only to sales made upon valid judgments, and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment, and that he may possibly acquire nothing. (*Boggs v. Hargrave*, 16 Cal. 559.)

A somewhat different rule prevails in cases where particular property is the subject of sale by a specific adjudication, as where the interest of A., in a certain tract, is decreed to be sold. To the validity of a decree of this character, the presence of A. is essential; and where present, the decree binds him, and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title—it may not, in fact, be of any value, and the purchaser takes that risk. To that

extent, the doctrine of *caveat emptor* applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive ; it is for that interest he makes his bid and pays his money. *Id.*

§ 243. **Recovery from Bidder.**—If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. (§ 695, C. C. P.)

§ 244. **Time of Re-sale.**—If the refusal to pay the amount of the bid is made at the time of the sale, the property may be offered for sale again at once, if there are other bidders present. But if the officer learns of the refusal to make the payment after the time fixed for the sale has passed, notices of re-sale should be posted, and the property re-advertised, as per § 692, C. C. P.

§ 245. **A Mandamus will not Lie** to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien. (*Williams v. Smith*, 6 Cal. 91.)

§ 246. **Title of Purchaser of Leasehold Interest.**—Upon a sale of real property, the purchaser

is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the sale is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in the Code of Civil Procedure. (§ 700, C. C. P.)

§ 247. **Proceedings against Corporations.**— § 1397 of the Penal Code provides that “when a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it, by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action.”

§ 248. **Title of Purchaser Generally.**— A purchaser at sheriff's sale does not acquire title, but only a lien, until after the period limited for redemption. The statute of this State, allowing a redemption of real property sold at judicial sales, plainly contemplates that the possession shall not change to the purchaser until the expiration of the time prescribed as a limit to the redemption. § 564, C. C. P., provides that “a receiver may be appointed in certain contingencies; the court may also restrain the commission of waste on the property;” and it is further provided that “it shall not be deemed waste for the person in possession of the property at the time of the sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used.” These provisions most clearly contemplate an adverse possession to the purchaser until the time has expired for redemption.

A sheriff, under an execution issued on a judgment, which is not a lien, can only seize and sell such title and interest as the judgment debtor had in the land at the time of the levy, and such as he acquired between the time of the levy and the sale.

If, after the levy of an execution by the sheriff, on public land, and before the sale, the judgment debtor, being preëmtioner, pays for the land levied on, and obtains a certificate of purchase, the purchaser at the sheriff's sale succeeds only to the equitable title of the judgment debtor, who, when he obtains the legal title by means of the patent, holds it in trust for the purchaser at the sheriff's sale. (*Kenyon v. Quinn*, 41 Cal. 325.)

§ 249. **Title of Purchaser not Dependent on Sheriff's Return.**—The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. (*Cloud v. El Dorado Co.*, 12 Cal. 129.) While it is undoubtedly the duty of the sheriff to make a return, and while it is important as evidence of a permanent and authentic character that he should do so, the title of the purchase does not depend upon his performance of this duty. The purchaser rests for title upon the judgment, execution, levy, sale, and deed; and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold. The authorities are uniform, we believe, on this subject.

§ 250. **When Owner is Estopped from Asserting Title.**—It is a well settled rule of all courts of equity, that the owner of land who stands by and sees

another sell it, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. In strict analogy to this rule, it is also a familiar principle, that one who knowingly and silently permits another to expend money on land, under a mistaken impression that he has title, will not be permitted to set up his right. (*Godeffroy v. Caldwell*, 2 Cal. 492.)

§ 251. **Certificate of Sale**—Upon the sale of real property under execution, the officer must give to the purchaser a certificate of sale, containing: 1. A particular description of the real property sold; 2. The price bid for each distinct lot or parcel; 3. The whole price paid; 4. When subject to redemption, it must be so stated. And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county. (§ 700, C. C. P.)

§ 252. **Cloud on Title**.—An officer is bound to levy upon the defendant's interest in real estate, when instructed to do so, even though the records may show *prima facie* that the defendant has transferred his interest in the property to a third party. But the party who has succeeded to that interest may have his remedy. There are numerous decisions in our own courts, declaring the right of the party injured by such a cloud upon title to his remedy. In *Pixley v. Huggins*, 15 Cal. 129, it is held that a deed from a

sheriff upon an execution sale against the vendor of plaintiff would have the same effect in casting a cloud upon the title, as if the deed were made directly by such vendor. Such a deed from the sheriff, put on record, would create doubts as to the validity, as against the judgment creditor, of the previous transfer to plaintiff.

The jurisdiction of a court to enjoin a sale of real estate is co-extensive with its jurisdiction to set aside and order to be canceled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defence to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the court that the deed casts a cloud over the title of the plaintiff. As in such case, the court will remove the cloud, by directing a cancelation of the deed, so it will interfere to prevent a sale, from which a conveyance creating such a cloud must result. Where property rights are thus involved, the officer may resort for his protection to proceedings provided for in § 689. Code Civil Procedure, and secure indemnity.

§ 253. **Levy on Homestead Void.**—The sheriff of Calaveras county was sued on his official bond for selling under execution against J. Kendall certain property claimed by plaintiff, as a homestead. The Supreme Court decided, in 10 Cal. 16, that no damage had or could result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury.

§ 254. **Cloud on Title of Homestead.**—The right of homestead having once attached, and not having been alienated, a deed from the sheriff, under an execution against the husband, would be a cloud upon the title, and prevent the free alienation of the property by the husband and wife. (*Dunn v. Tozer*, 10 Cal. 167.)

Where a homestead is sold by the sheriff, on an execution against the husband, or husband and wife, and a deed given to the purchaser therefor, it is a cloud upon the title, and a court of equity will remove it. (*Riley v. Phel and wife*, 23 Cal. 71.)

§ 255. **When Sale may be Enjoined.**—A sale by a sheriff, of real estate, upon an execution against the grantor, will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale. (*England v. Lewis*, 25 Cal. 338.)

§ 256. **How Homestead may be Levied upon.**—There is no lien of the judgment upon a homestead until the levy of an execution; and that levy creates no lien, except for the purpose of and as a foundation for, instituting and carrying on proceedings to have an appraisement and sale under the statute. The homestead (except in the cases enumerated in § 1241, Civil Code), no matter what may be its actual value, cannot be subjected to execution or forced sale, except in the manner pointed out in §§ 1245, 1259, Civil Code.

§ 257. **Sale of Homestead.**—A sale by a sheriff,

under execution, of a house claimed as a homestead by the defendant in execution, and ascertained by appraisal to be worth over \$5000, should not be made until an exact appraisal of the value of the premises is obtained, so that the sheriff can convey a definite fractional undivided interest therein.

It follows that a deed of the premises claimed as a homestead, given by the sheriff to the purchaser at the execution sale, for the excess of value of the premises over \$5000, conveys an undefined and uncertain interest, upon which the purchaser cannot maintain an action for possession and *mesne* profits.

The question as to whether buildings used for hotels, stores, etc., are susceptible of dedication for homestead purposes is reserved. (*Gary v. Estabrook*, 6 Cal. 480.)

§ 258. When Judgment is not a Lien.—Where a homestead was declared after an attachment on the land and a judgment in a Justice's Court, but no abstract had been filed or recorded in the recorder's office, it was held (*Wilson v. Madison*, 58 Cal. 1), that at the time of the declaration of homestead, the judgment did not constitute a lien upon the premises within § 1241 of the Civil Code, and a sale under the judgment conveyed no title.

§ 259. Judgment no Lien upon Homestead.—In this State, a judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor, which is not exempt from execution. (*Bowman v. Norton*, 16 Cal. 214.)

§ 260. **Return of Writ.**—An execution should not be returned until the return day indicated in the writ, except upon written instructions from the plaintiff or plaintiff's attorney. An officer's return on process of every kind should state that he has performed what the mandatory part of the process required of him. It should be a report of his proceedings, and should contain a statement of the acts which he has done under and by virtue of it, and the place and the time when and where they were done. The office is merely ministerial. Hence it is insufficient for him to return that he has duly or legally served the process committed to him.

CHAPTER X.

FORECLOSURE.

§ 261. Sales under Foreclosure.

§ 262. Title Conveyed by Foreclosure Sale.

§ 261. **Sales under Foreclosure.**—It is not necessary that a sheriff should go upon the land to make a formal levy under a decree of foreclosure and order of sale of real property. The officer must post written notice of the time and place of sale, particularly describing the property, as the description is given in the decree, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold (all sales of real property must be made before the court-house door of the county) and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one. The notices must state the kind of money in which bids must be made, as specified in the judgment. The course of procedure in selling property under foreclosure is the same as that provided for sales under writs of execution issued against the property of the judgment debtor. The sheriff should make his return as soon as the sale, delivery and filing of the certificate of sale are accomplished, to enable the plaintiff to have docketed any deficiency that may exist against the judgment debtor. The plaintiff, in most cases, is entitled to an execution for the deficiency, and any undue delay in making the return, may entail loss upon the plaintiff, for which the sheriff would be responsible.

As a personal judgment cannot be docketed against the defendant, in a suit for foreclosure of a mortgage, until it is ascertained by the sheriff's return that a balance remains due, the officer should use no unnecessary delay in making his return. If the judgment debtor has no other property that may be levied upon, the plaintiff may expect such promptness on the part of the officer as will enable him to secure the remainder of his judgment, if it can be made.

The well-established rules in equity proceedings require in foreclosure cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second. (*Raun v. Reynolds*, 11 Cal. 14.)

A sheriff has no authority to make a sale of mortgaged premises under a judgment of foreclosure and sale, unless an order of sale is issued upon the judgment and placed in his hands. (*Heyman v. Babcock*, 30 Cal. 367.)

A second order of sale may issue, if the first order of sale be not executed. Such second order might in some cases be ground of objection on the score of costs, but it is not objectionable as affecting the validity of the sale. (*Shores v. Scott River Water Co.*, 17 Cal. 626.)

§ 262. Title Conveyed by Foreclosure Sale.—
A sale by the sheriff under a judgment in a foreclosure suit, directing a sale of all the defendant's right, title, and interest in the mortgaged premises, carries all the title which the defendant had in the premises at the time of the institution of the foreclosure proceedings. (*Hutchings v. Ebeler*, 46 Cal. 557.)

CHAPTER XI.

REDEMPTION.

- § 263. Power of Sheriff in Redemption.
- § 264. When Title Passes.
- § 265. Who may Redeem.
- § 266. Though Defendant has Conveyed to Another, he may Redeem.
- § 267. Time of and Payment in Redemption.
- § 268. Judgment Debtor not to Pay Prior Liens.
- § 269. When Deficiency on Judgment need not be Paid in Redemption.
- § 270. Status of Redemptioner.
- § 271. Subsequent Judgment Lien.
- § 272. When Judgment Debtor or Redemptioner may Redeem.
- § 273. How Redemptioner may Redeem.
- § 274. Other Redemptioners.
- § 275. Who cannot Redeem.
- § 276. Redemption where Tenants in Common.
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- § 279. Rights of Purchasers.
- § 280. Rights of Mortgagor.
- § 281. Redemption of Real Estate of a Decedent.
- § 282. Change from Real to Personal Property.
- § 283. Costs of Appeal in Redemption.
- § 284. Payments in Redemption.
- § 285. Redemption in Treasury Notes.
- § 286. What Money Sheriff may Receive in Redemption.
- § 287. Withdrawing Redemption Money Defeats Redemption.
- § 288. Payment under Protest.
- § 289. The Sheriff's Deed.

§ 263. **The Power of the Sheriff** in relation to redemption is purely statutory, and his acts are nugatory unless the provisions of the statute are pursued. Who, and how they may redeem, is set forth in §§ 701, 702, 703, 704 and 705, Code of Civil Procedure. The simplest manner in which redemption may be effected, is through the purchaser, if he will recognize the right of the applicant to redeem and waive the usual formalities, by paying to such purchaser the redemption money and receiving from him the requisite transfer. But if the redemption is sought to be made through the officer who made the sale, all the requirements of the statute must be complied with to secure the redemption.

§ 264. **When Title Passes.**—The statute allowing a redemption of property sold at judicial sale contemplates that the possession shall not change to the purchaser until the expiration of the time limited for redemption. (*Guy v. Middleton*, 5 Cal. 392.) The title does not pass until the execution and delivery of the deed. The legal estate exists in the judgment debtor after expiration of the time to redeem, until execution of the conveyance to the purchaser.

§ 265. **Who may Redeem.**—Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons, or their successors in interest :

1. The judgment debtor, or his successor in interest, in the whole or any part of the property ;
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was

sold. The persons mentioned in the second subdivisions of this section are termed redemptioners. (§ 701, C. C. P.)

The right to redeem, under the statute, from a sale on execution, exists in some instances where there is no equity, and in other instances in connection with the equitable right. Parties to the suit in which the judgment is rendered, under which the sale is made, are restricted to the six months given by statute. Parties acquiring interests pending suits to enforce previously existing liens, or after judgment docketed or sale made, have no equity, and are confined to the rights given by the statute; but parties obtaining interests subsequent to the plaintiff, and before suit brought, who are made parties in such suit, possess the equitable and statutory right. They may redeem under this statute, or they may file their bill in equity. Where a mechanic's lien attached on certain premises, January 18, 1856, and a mortgage was placed on the same premises, January 21, 1856, and a suit was brought subsequent to the execution and record of the mortgage, to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months no redemption being had, a deed was executed to the assignees of the sheriff's certificate, it was held, in *Whitney v. Higgins*, 10 Cal. 547, that the right of the mortgagees to redeem the premises, by paying off the incumbrance of the mechanic's lien, was not affected by the decree and the proceedings thereunder, and that the purchasers of the premises, upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, were entitled to the same right to redeem.

§ 266. **Though Defendant has Conveyed to Another, he may Redeem.**—A defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another, the property sold under execution. (Yoakum v. Bower, 51 Cal. 539.) § 701 of the Code of Civil Procedure provides in terms that property sold subject to redemption may be redeemed by the judgment debtor or his successor in interest in the whole, or any part of the property. The successor in interest may redeem, but the judgment debtor may also do so. The statute provides that the judgment debtor, as such, may redeem; not that he may redeem only, and in the event, that he has no successor in interest in the property sold under execution. The court holds that there is no good reason why the statute, which is remedial in its character, should receive a narrow construction, in order to defeat the right of redemption which it intended to give. It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale, and a variety of other cases might readily be imagined, in which the judgment debtor, even though he had sold the property, would still have an interest in effecting a redemption from the execution sale.

Nor is it necessary for the judgment debtor, in effecting a redemption, to produce a certificate or other credential required by § 705 of the Code of Civil Procedure. That section applies only to "redemptioners," and these are only the persons mentioned in the second subdivision of § 701, and the "judgment debtor" is not one of these.

§ 267. **Time of and Payment in Redemption.**

§ 702 of the Code of Civil Procedure provides that the judgment debtor, or redemptioner, may redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest.

§ 268. **Judgment Debtor not Compelled to Pay Prior Liens.**—In the case of *Sharp v. Miller*, 6 Cal. 82, the court held that the judgment debtor is not obliged to pay other liens which the purchaser may have on the property. The code makes a distinction between a redemption of the judgment debtor and by a creditor holding a lien on the property. Under § 702, Code of Civil Procedure, “the judgment debtor or redemptioner may redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase,” etc. The same section further provides, “that if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made,” he must also pay the amount of such lien. § 701 defines a redemptioner to be “a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.” The judgment debtor is not

a "redemptioner" in the sense in which that term is employed in § 702.

But if a "redemptioner," or, in other words, a creditor, holding a subsequent lien on the property redeems, he must also pay to the purchaser any liens he may have prior to that of the redemptioner other than that for which the property was sold. The reason for the distinction made between the judgment debtor and a redemptioner is, that if the latter were permitted to redeem without paying the prior lien held by the purchaser, the title would pass to the redemptioner and the lien of the purchaser would be defeated. But if the judgment debtor redeem, he is restored to his estate, and the lien held by the purchaser will be available.

§ 269. **When Deficiency on Judgment need not be Paid in Redemption.**—Where, upon a foreclosure of a mortgage, the mortgagee purchases the land for a sum less than the amount of the judgment, and docketts a judgment for the deficiency, the purchaser from the mortgagor of the land, pending the time for redemption, is entitled as successor in interest to redeem from the mortgagee, without paying the amount of the deficiency. The former rule, that when real estate which is subject to a judgment lien is sold on an execution on the judgment, to the judgment creditor, for a sum less than the whole amount of the judgment, the judgment creditor continues to be "*a creditor having a lien*" for the unsatisfied portion of the judgment upon the property sold under the execution, and that neither the judgment debtor or a redemptioner with a subsequent lien could redeem without paying said judgment, has been changed by the Code

of Civil Procedure. (Simpson *v.* Castle, 52 Cal. 645.)

During the time for redemption, the legal title is in the mortgagor, and may be conveyed by him, and the grantee becomes entitled to redeem, without paying to the mortgagee the unsatisfied portion of the judgment under which the property was sold to him, and the judgment for the deficiency is not a lien on the land.

A judgment docketed for a deficiency, after the sale of the mortgaged premises under a judgment of foreclosure, is not a lien upon the premises sold, if they are purchased by any person other than the mortgage debtor. (Black *v.* Gerichten, 58 Cal. 56.) In this case, the judgment in the lower court was on a demurrer to the complaint, which alleged that in an action by the Commercial Bank of San Diego against Wm. S. Gregg *et al.*, the plaintiff and one Luce were made parties defendant, and filed a cross-complaint, setting up a junior mortgage and paying for its foreclosure; that under a decree in that case, the land was sold, and the older mortgage satisfied; that the junior mortgage was partly satisfied, and a judgment docketed for the deficiency; that the land was purchased at the sale by the Commercial Bank, the senior mortgagee; that plaintiff, Black, had succeeded to the rights of Luce by assignment; that defendant, Gerichten, had redeemed, as redemptioner, from the purchaser, and that Black had offered to redeem from him.

§ 270. **To Entitle a Party** to the status of a redemptioner, it must appear that he was the mortgagor, or judgment debtor, or successor in interest of the judgment debtor, or a creditor having a lien by judgment or mortgage on the property sold at foreclosure sale.

§ 271. **Subsequent Judgment Lien.**—The payment, by a judgment debtor, of the judgment, after a sheriff's sale, extinguishes the lien ; and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. (McCarty *v.* Christie, 13 Cal. 79.)

The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien ; after conveyance to him, he has the same right as successor in interest to the debtor or mortgagor. (McMillan *v.* Richards, 9 Cal. 413.)

§ 272. **When Judgment Debtor or Redemptioner may Redeem.**—§ 703, C. C. P. provides that "If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest ; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemp-

tioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff, and a duplicate filed with the recorder of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff, and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of six months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by a debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged, or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof

in the margin of the record of the certificate of sale.

A creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. (*McMillan v. Richards*, 9 Cal. 365.)

A redemptioner may exercise his right to redeem land sold on execution, if no redemption has been made by the judgment debtor, at any time during the six months after the sale; and if in sixty days thereafter there is no redemption from him, the right to redeem from him is gone, even as to the judgment debtor, and he is entitled to a sheriff's deed. (*Boyle v. Dalton*, 44 Cal. 332.)

§ 273. How Redemptioner may Redeem.—

A redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed, or if he redeem on a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien. (§ 705, C. C. P.)

When the redemption is attempted to be effected through the sheriff, he has no authority, either to receive the redemption money from one claiming the right to redeem under a judgment, or to execute a

deed to him, unless the redemptioner produces a copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court or of the county where the judgment is docketed; or, if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder—a copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto; an affidavit of himself or his agent, showing the amount then actually due upon the lien. (§ 705, C. C. P.) He should bear in mind that a transcript of a judgment is not equivalent to a copy of the docket of the judgment.

The equitable right to redeem property sold under a decree of foreclosure held by subsequent incumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in court, and an opportunity of setting up any equities they possessed.

After the decree, they stand, as to their right of redemption, in the same position as ordinary judgment debtors. (*Montgomery v. Tutt*, 11 Cal. 317.)

§ 274. **Other Redemptioners.** — A subsequent judgment creditor, having a lien, has a right to redeem real estate sold by foreclosure of a previous mortgage in the hands of the purchaser. (*Kent v. Cahoon*, 2 Cal. 595.)

A creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. (*McMillan v. Richards*, 9 Cal. 365.)

A subsequent mortgagee would have a right to

redeem premises from a sale under a judgment upon mechanics' lien by paying the money justly due, interest, costs, etc., he not having been a party to the suit by the lien holder. (*Gamble v. Woll*, 15 Cal. 510.)

A mortgagee of the defendant in execution, who has failed to record his mortgage until after the sale, has no lien or intervening rights as against the purchaser: he can redeem under the statute: if he fails to do so, a court of equity will not interpose. (*Smith v. Randall*, 6 Cal. 53.)

The right of the mortgagor to redeem is not affected by the fact that he may have had no title to the mortgage property, nor can the mortgagee refuse the redemption money, if tendered, because the mortgagor had no title to mortgage. (*Lorenzana v. Camarillo*, 45 Cal. 125.)

A deed conveying land, and in express terms reserving to the grantor a lien to secure the payment of two promissory notes for a part of the price, creates an equitable mortgage upon the land. Such lien is more than a vendor's lien, and is not lost by the assignment of the promissory notes. (*Dingly v. Bank of Ventura*, 57 Cal. 467.) Such a lien may be foreclosed as a mortgage, and there is the same right of redemption for a limited period after a foreclosure sale.

Possibly a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold in foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. (*McDermott v. Burke*, 16 Cal. 590.)

Leonis, a prior mortgagee, brought suit for foreclosure, obtained the usual decree, and the writ was placed in the sheriff's hands for execution. The mortgagees then executed a conveyance of the prem-

ises to Leonis, it not being intended by the latter that his security should merge in the conveyance or that his lien should be extinguished. Following, Leonis purchased the premises at the sheriff's sale. Plaintiff claiming under a junior mortgage, not affected by the prior suit, joined Leonis as defendant in an action of foreclosure, claiming the conveyance to Leonis operated a merger of his mortgage lien upon the premises. The court adjudged that the lien of Leonis was not merged; that plaintiff should redeem the property from Leonis by paying the latter the amount bid at the sheriff's sale. (*Rumpp v. Gerkins*, filed January 11th, 1882.)

§ 275. **Who cannot Redeem.**—Where a mortgagor filed a homestead subsequent to a second mortgage, and both mortgages were foreclosed, the first mortgage and part of the second being paid, and judgment for the deficiency due the second mortgagee being docketed; it was held, in *Hershey v. Dennis*, 53 Cal. 77, that the lien of the docketed deficiency was superseded by the homestead, and that the second mortgagee could not redeem from the purchaser at the mortgage sale.

§ 276. **Redemption where Tenants in Common.**—Where land sold under judgment is embraced in one sale, a redemptioner having a lien upon a share or part of the land sold can only redeem by paying the whole of the purchase-money and redeeming the whole of the land; and, in such case, he succeeds to the whole interest of the purchaser. Accordingly, where land was sold under a judgment of foreclosure against tenants in common, and redeemed by a judg-

ment creditor of one of the tenants, who in due course received his deed (as in the case *Eldridge v. Wright*, 55 Cal. 531), it was held that the redemptioner took the interests of both tenants. Mr. Justice Thornton delivered the opinion of the court in this case. Mr. Justice Sharpstein, concurring in the judgment, doubted whether the redemptioner had a right to redeem a greater interest in the property sold than that of his judgment debtor; but was of the opinion, as the purchaser did not object to his redeeming the whole property, that the effect of the transaction was to vest in him the whole interest of the purchaser. Mr. Justice Myrick, dissenting, was of opinion that the redemptioner was subrogated to the rights of his judgment debtor, and thus became the owner of the legal title formerly held by him; and, as to the other tenant, that he acquired an equitable lien upon his interest as security for one-half of the redemption money.

A. owes B. a debt; to secure it, A. and C. jointly mortgage to B. a piece of land owned by them in common. Subsequently, A. mortgages his undivided interest in the land to secure a debt to D. B. forecloses against A. and C., and buys in the whole land, not making D. a party. The time of statutory redemption having expired, B. gets a sheriff's deed: *Held*, that D., as subsequent mortgagee, may redeem A.'s but not C.'s interest in the land, and that the sale is final as to C.'s interest, D. not being a necessary party to the foreclosure. (*Kirkham v. Dupont*, 14 Cal. 563.)

§ 277. **Rights of Creditors.**—After the execution of a mortgage upon real estate, a judgment was rendered against the mortgagor, which became a lien

upon the mortgaged property; the mortgagee then foreclosed the mortgage, making the mortgagor alone a party defendant, had the property sold under the decree, became the purchaser, and obtained a sheriff's deed; afterwards, the judgment creditor procured an execution upon his judgment, and had the property advertised for sale; the holder of the title under the sheriff's deed filed a bill in equity to enjoin the sale: *Held*, that he was not entitled to an injunction, and that the judgment creditor had a right to sell any interest in the land held by the judgment debtor at the rendition of the judgment or levy of the execution. *Held*, further, that the judgment creditor's equitable right of redemption not having been cut off by the foreclosure, he might, during the two years that his judgment was a lien upon the premises, sell under an execution, and purchase the legal title of the mortgagor, not only that he might assert his right of redemption at any time within the period allowed by the Statute of Limitations, but, also, that he might realize any other benefit or advantage that might accrue to him from the sale. (Alexander v. Greenwood, 23 Cal. 506.)

§ 278. **Rents and Profits in Redemption.**—The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be

paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amount of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor. (§ 707, C. C. P.)

§ 279. **Rights of Purchasers.**—Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. After sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents. (McDevitt v. Sullivan, 8 Cal. 593.)

A purchaser of land at sheriff's sale can maintain an action for rent against the tenant-in-possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease when he purchased. (Reynolds v. Lathrop, 7 Cal. 43.) The sale operates as an assignment of the lease for the time.

The purchaser at sheriff's sale of a "water-ditch," is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant, and where a judgment debtor remains in possession of a "water-ditch" after sheriff's sale, and collects the rents and profits during the six months following, he is a trustee of the fund for the purchaser at the sale, and, if the fund be in danger of loss, a bill in equity to account, will lie. (*Harris v. Reynolds*, 13 Cal. 515.)

A judgment debtor who redeemed his property within twenty-one days after the sheriff's sale, but who had received from his tenants in possession \$445, rent between the day of sale and the redemption, held liable to the purchaser at the sale for the amount so received. (17 Cal. 596. Also, cited as authority in *Walls v. Walker*, 37 Cal. 432; and see *Knight v. Truett*, 18 Cal. 113; *Raun v. Reynolds*, *Id.* 289; *Hill v. Taylor*, 22 Cal. 191; *Henry v. Evarts*, 30 Cal. 425; *Webster v. Cook*, 38 Cal. 425; *Page v. Rogers*, 31 Cal. 294.)

While the statute gives to the purchaser the right to receive the rents of the property sold, pending the time for redemption, he cannot enforce such right by writ of attachment against the tenant's property. In the case of *Walker v. McCusker*, opinion filed in department two of the Supreme Court, June 28th, 1884, the court say:

"This action was brought to recover of the defendant, as tenant in possession of real estate purchased by plaintiff on decree of foreclosure and sale, the sum of \$1200, value of the use and occupation from the day of sale to the making of the deed. The plaintiff

sued out a writ of attachment by which property was attached; the defendant moved that the attachment be dissolved; the court below denied the motion, and the appeal from the order of denial is before us.

“§ 707, C. C. P., declares that the purchaser, from the time of sale, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation.

“The liability of the tenant in possession to the purchaser, for rents or use and occupation from the day of sale to the expiration of the time for redemption is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a contract expressed or implied within the meaning of § 537, C. C. P., authorizing the issuance of an attachment.

“The order is reversed and the cause is remanded, with instructions to dissolve the attachment.”

§ 280. **Rights of Mortgagor.** — A mortgagor, after a sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property of its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. (*Sands v. Pfeiffer*, 10 Cal. 259.)

§ 281. **Redemption of Real Estate of a Decedent.**—§ 1505, C. C. P., provides that “when any judgment has been rendered for or against the testator, intestate in his lifetime, no execution shall issue thereon

after his death, except as provided in § 686. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living."

A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living. (§ 1505, C. C. P.)

§ 282. Change from Real to Personal Property.—The severance and removal of a house from the freehold changes the character of the house from real to personal property, whether the severance is by the act of God or of man. A house on a mortgaged lot in Sacramento was carried by the flood in 1862 into the street, a short distance from the lot. The owner made a contract with one Lowell to sell him the house, and Lowell was about to remove it, when the mortgagee brought an action to foreclose the mortgage and to restrain the removal. At the trial, the court rendered a judgment against the owner of the lot for the amount due on the note; and a decree for the

foreclosure of the mortgage and for the sale of the mortgaged property, excepting the house, and as to that, it was ordered that the decree should not affect nor authorize its sale. The judgment was affirmed. (*Buckout v. Swift*, 27 Cal. 434.) It was held that the severance and removal of the house withdrew the house from the operation of the mortgage lien, and that after the removal the mortgagor or his assignee had a right to sell the house, and the purchaser to convert it to his own use.

§ 283. **Costs of Appeal in Redemption.**—Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages, with the costs, do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. (*McMillan v. Vischer*, 14 Cal. 232.)

§ 284. **Payments in Redemption.**—The payments mentioned in §§ 702 and 703 of the Code of Civil Procedure, may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

The tender of the redemption money extinguishes the purchaser's lien, and is equivalent to payment. (*Hershey v. Dennis*, 53 Cal. 77.)

§ 285. **Redemption in Treasury Notes.**—It is

held, in the case of *The People ex rel. Mulford v. Mayhew*, sheriff, 26 Cal. 656, that the obligation of a judgment creditor or redemptioner to pay a certain amount of money in order to exercise the statutory right of redemption from a sale of land made by a sheriff, is a debt within the meaning of the Act of Congress, making treasury notes lawful money and a legal tender in payment of debts. Land sold at sheriff's sale under a judgment payable generally in money, without specifying a particular kind of money, may be redeemed with treasury notes.

§ 286. **What Money Sheriff may Receive in Redemption.**—The sheriff is the special agent of the purchaser of land, authorized to receive the redemption money for him, and, as such, may receive in redemption any lawful money, unless the judgment under which the sale was made was rendered payable in a particular kind of money. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks. (*People v. Mayhew*, 26 Cal. 655.)

§ 287. **Withdrawing Redemption Money Defeats Redemption.**—If the judgment debtor, whose land has been sold on the judgment, deposits with the sheriff, before the time for redemption expires, money sufficient to redeem it from the sale, and the sheriff, after the time for redemption expires, executes and delivers to the purchaser a deed, the judgment debtor, if he would claim the benefit of the redemption, must not withdraw the money from the sheriff, for by withdrawing the money he ratifies the act of the sheriff in delivering the deed. (*Wilkins v. Wilson*, 51 Cal. 212.)

§ 288. **Payment under Protest.**—When a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. (McMillan *v.* Vischer, 14 Cal. 232.)

§ 289. **The Sheriff's Deed.**—Formerly, when a sheriff sold land under execution, and gave a certificate of sale to the purchaser, and subsequently his term of office expired, he was the proper person to make the deed. But under the Act to Establish a Uniform System of County and Township Governments, approved March 14, 1883, it is provided that “when any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office; and when the sheriff sells real estate under and by virtue of an execution or order of court, he, or his successors in office, shall execute and deliver to the purchaser, or purchasers, all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale.”

CHAPTER XII.

SHERIFFS' DEEDS.

- § 290. When Deed is Due.
- § 291. When Deed Takes Effect.
- § 292. What Sheriff's Deed Conveys.
- § 293. Recitals in Sheriff's Deed.
- § 294. Parol Evidence not Admissible.
- § 295. Who Estopped by Recitals in Sheriff's Deed.
- § 296. Against Whom Officer's Deed is Evidence.
- § 297. How Meaning of Deed Ascertained.
- § 298. Against Whom Officer's Deed not Evidence.
- § 299. Sheriff's Deed Void.
- § 300. When Mandamus to Sheriff will not Lie.
- § 301. Deed by Deputy Sheriff.

§ 290. **When Deed is Due.**—The purchaser, or his assignee, is entitled to a sheriff's deed after the expiration of six months from the day of sale, if no redemption has been made.

The term "months" used in the statute, fixing the period of redemption from judicial sales, means calendar, and not lunar, months; and a sheriff's deed executed before the expiration of the statutory period of redemption, is absolutely void, and not merely voidable. (*Gross v. Fowler*, 21 Cal. 393.)

§ 291. **When Deed Takes Effect.**—When a judgment is rendered in an attachment suit, and be-

comes a lien on real property, the lien of the attachment is merged in the judgment, and the deed which follows takes effect from the date of the attachment. The judgment does not operate so as to release or obliterate the attachment lien. The property attached is still in contemplation of law in the hands of the officer, subject to the judgment. The property is sold under final process issued on the judgment, but the deed made to the purchaser at the sale, as the last of the series of acts, takes effect from the date of the levy of the attachment, as the first of the series of acts, and perfects the title of the property from the day when it was taken by the officer for the satisfaction of the judgment. In the case of *Porter v. Pico*, 55 Cal. 174, Mr. Justice McKee, who delivered the opinion of the court, said: "Perhaps it would be more in accordance with the fitness of things to deal with the fact of the levy of the attachment as of an incipient execution, by which the officer has taken into his possession the subject of the levy for the satisfaction of any judgment which might be recovered, and to order him, after judgment, to sell the specific property for that purpose. Under the other practice, the levy of the attachment, upon the principle *transit in rem judicatam*, becomes merged in the judgment, and the judgment perpetuates the lien of the levy, and the sheriff's deed perfects the title which passes by the sale under the judgment and relates to the date of the levy. Upon these principles, it is not necessary for the court, in order to enforce priority of lien, to make an order for the sale of the property attached, or to issue a *venditioni exponas*. The execution upon the judgment is a sufficient authority to the sheriff to sell the real property which he has in his possession, and the deed which he makes

relates back to the date of the lien perpetuated by the judgment."

A sheriff's deed takes effect from the time of its actual delivery, and the execution of the deed by the sheriff, and information given by him to the grantee that the deed is ready for him, do not amount to a delivery. (*Jefferson v. Wendt*, 51 Cal. 573.) The Statute of Limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser, or some one for him, in such a way as to be beyond the legal control of the grantor.

§ 292. **What Sheriff's Deed Conveys.**—A decree foreclosing a mortgage, and directing the sale of the mortgaged premises, and the execution of a sheriff's deed under the decree, transfer to the purchaser whatever interest the mortgage created and vested in the mortgagee, and nothing more. (*Branham v. San Jose*, 24 Cal. 585.)

§ 293. **Recitals in Sheriff's Deed.**—The officer who makes a sale of land by virtue of an execution, and executes to the purchaser a deed therefor, must, in his deed, make recitals of the recovery of the judgment, the names of the judgment creditor or creditors, and of the judgment debtor or debtors, and of the issuing of an execution on the judgment, and of the levy and sale thereunder. The recital of such facts are essential to show the officer's authority and the transmission of the debtor's title in the property to the purchaser. (*Donahue v. McNulty*, 24 Cal. 411.)

It may be regarded as settled in this State, that the

mis-recital of the execution in an officer's deed will not affect the validity of the deed, if the officer had authority to sell.

§ 294. **Parol Evidence not Admissible.**—Parol testimony of the officer who makes a sale of property under an execution, and executes a deed to the purchaser therefor, is not admissible for the purpose of adding to, contradicting, or altering the terms of the deed. (*Donahue v. McNulty*, 24 Cal, 412.)

Parol evidence is inadmissible to show that a constable's sale was made by virtue of any other judgment or execution than that recited in the deed; and it is also inadmissible to show that the constable sold the interest of a person in the land described in the deed, whose interest the deed itself does not recite upon its face to have been sold.

§ 295. **Who Estopped by Recitals in Sheriff's Deed.**—The officer executing a deed for property sold under execution, and those who claim under the deed, are estopped from denying the truth of the matters recited therein, but the same are not evidence as against strangers, or those claiming adversely to the deed. (*Donahue v. McNulty*, 24 Cal. 411.)

§ 296. **Against Whom Officer's Deed is Evidence.**—A deed of a constable, made of land sold under execution, is not evidence of the purchaser's title as against any person except those whom the deed shows upon its face to have been judgment debtors, and named as such in the execution issued on the judgment, and whose interest in the property was sold by the officer.

§ 297. **How Meaning of Deed Ascertained.**—Where the language of a deed executed by an officer for property sold under execution is plain and unambiguous, the court should limit its inquiry to what the words of the deed express, without regard to any intention independent of the words. *Id.*

§ 298. **Against Whom Officer's Deed not Evidence.**—Where a judgment was rendered against several persons, and the execution issued upon it against all the judgment debtors, and the constable levied upon and sold the land of one of the judgment debtors, but, in making a deed to the purchaser, did not insert the name of the one whose land had been sold as a judgment debtor, or recite that his land had been sold: *Held*, that the deed was not evidence of title in the purchaser as against the owner of the land.

§ 299. **Sheriff's Deed Void.**—If a sheriff's deed be given before the time for redemption has expired, it is void.

§ 300. **When Mandamus to Sheriff will not Lie.**—A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase-money, on the ground that he is entitled to it as oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of his lien. (*Williams v. Smith*, 6 Cal. 98.)

§ 301. **Deed by Deputy.**—A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff. (*Lewis v. Thompson*, 3 Cal. 267.)

CHAPTER XIII.

WRIT OF ASSISTANCE.

- § 302. Object of the Writ.
- § 303. Plaintiff Entitled to Immediate Service.
- § 304. Against Whom Writ will Issue.
- § 305. When Writ will be Refused.
- § 306. When Writ may Issue.
- § 307. Where Tenants in Common.
- § 308. Who not to be Removed.
- § 309. Alias Writ.
- § 310. False Return.

§ 302. **Object of the Writ.**—A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed.

§ 303. **Plaintiff Entitled to Immediate Service.**—Under the writ of assistance, the party for whose benefit it is issued is entitled to immediate possession. The writ commands the sheriff to forthwith place the plaintiff in possession, and it is only by his consent that any delay in its service can be permitted.

In the case of *Chapman v. Thornburg*, sheriff of Yuba county, 17 Cal. 87, where the sheriff received a writ of assistance, commanding him forthwith to deliver possession of certain real estate to plaintiff; and went

with plaintiff to the premises for the purpose of putting him in possession, but for some reason not stated—in opposition to plaintiff's wishes and against his protestations—he declined to take any action in the matter, and then, on a subsequent day, the sheriff proceeded to execute the writ; but the parties in possession, being the parties against whom the writ run, had, in the meantime, destroyed a number of valuable fixtures, and by their willful and malicious acts had injured the premises in other respects: *Held*, that the sheriff is liable for the damage thus done; that he is presumed to know what his duty was, and to have acted in willful violation of it; and that, as his duty was to execute the writ at the earliest practicable moment, and he neglected and refused so to do, it was through his fault that the parties in possession were enabled to commit the injury; and he must respond in damages, however remote.

§ 304. **Against Whom will Issue.**—A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree. In a suit for foreclosure, all persons interested in the premises, prior to the suit, whether purchasers, heirs, devisees, remainder-men, or incumbrancers, must be made parties (*Montgomery v. Tutt*, 11 Cal. 314); otherwise their rights will not be affected. The purchaser under a decree takes a title only as against the parties to the suit. All the authorities agree that parties not brought into a suit of foreclosure preserve certain rights, but the point where they differ is, as to what those rights are.

One Lefevre, a married man, purchased certain real estate, subject to a mortgage thereon, which had been

previously executed by his grantor, and soon afterwards died. The mortgagee commenced an action to foreclose the mortgage, making the executors of Lefevre, but not the widow, a party, and after a decree of foreclosure and sale and expiration of the time of redemption, received the sheriff's deed (himself being the purchaser), and thereupon applied to the court for a writ of assistance against the widow, who retained possession of a portion of the premises, which, on demand, she refused to surrender: *Held*, on appeal from an order denying the writ, that the denial was proper; that the estate conveyed to Lefevre became thereby the common property of himself and wife; that upon his death, the title to one-half of this property vested in her, subject only to the mortgage and the lien for the payment of debts; that this title was not affected by the proceedings in the foreclosure suit to which she was not a party; and that not being bound by the decree, a writ of assistance could not be issued against her. (*Burton v. Lies et al.*, 21 Cal. 88.)

A person who, pending an action for the foreclosure of a mortgage, and with notice of its pendency, purchases from one of the defendants therein a portion of mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree. (*Montgomery v. Byers*, 21 Cal. 107.)

§ 305. **When Writ will be Refused.**—If the court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused. (*Steinbach v. Leese*, 27 Cal. 296.)

A writ of assistance will not be issued against a purchaser of the mortgaged premises who buys during the pendency of a suit to foreclose, and who is not a party to the suit, without actual or constructive notice of its pendency. (Harlan *v.* Rackerby, 24 Cal. 561.) In this case the *lis pendens* in the foreclosure suit was filed subsequent to the purchase of the property from the defendant in that suit, and the purchaser was entitled to be heard in his defense before he could be deprived of his property.

In Langley *v.* Voll, 54 Cal. 435, upon an application for a writ of assistance, to place the grantee of the purchaser of real estate under a judgment sale in possession, it appeared that the defendants had acquired, or claimed to have acquired, a new right to the possession from the purchaser; it was held that the writ should have been denied, and the parties left to settle their rights in a regular suit.

A party who forecloses a mortgage, given by one partner, on, and obtains a sheriff's deed for, an undivided interest in partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession, as against a receiver who has been appointed by the court, at the instance of such other partner, in an action commenced by him to dissolve the partnership, and have the partnership property sold to pay the debts. (Autenreith *v.* Hessenauer, 43 Cal. 356.)

§ 306. **When Writs of Assistance may Issue.**—The power of District (Superior) Courts to issue writs of assistance is limited to sales on judgments rendered by the District (Superior) Court to which the applica-

tion for a writ of assistance is made. (*People v. Doe*, 31 Cal. 221.)

If the decree in a foreclosure suit directs the sale of all the mortgaged premises, and forecloses and bars the equity of redemption of the defendants, and directs that the purchaser at the sheriff's sale be let into possession, the person who receives the sheriff's deed, after a sale, is entitled to a writ of assistance as against all the defendants who were served with process or appeared in the action. This rule prevails as against a defendant who is not mentioned in the decree by name, and also against one whose name is not mentioned in the sheriff's deed. (*Frisbie v. Fogarty*, 34 Cal. 11.)

§ 307. **Where Tenants in Common.**—It is the duty of the sheriff, in the execution of a writ of assistance, to place the purchaser on foreclosure of mortgage of an estate in common in the possession of every part and parcel of the land, jointly with the other tenants in common. (*Tevis v. Hicks*, 38 Cal. 234.) In this case the sheriff found, on going to the ranch of defendant, that Mrs. Hicks, wife of defendant, held in her own right, as her separate property, an undivided interest in the whole rancho, derived from a source independent of her husband. In the decision of the court, "she was not liable, under any writ to which the applicant has shown himself entitled, to be ejected or removed from the rancho, or any portion thereof; but she, or anyone in possession for her, was and is bound to admit the applicant to a joint and common possession and occupancy with her, not only of the house and two hundred acres surrounding the same, but of every part and parcel of the entire rancho."

§ 308. **Who not to be Removed.**—In the execution of the writ, the sheriff cannot remove any of the tenants in common who hold under a title derived from a source independent of him through whom the purchaser claims. *Id.*

§ 309. **Alias Writ.**—If the return to the first writ does not clearly declare that it has been fully executed, and it is made to appear by affidavits that it has not been, it is competent for the court to issue another writ. *Id.*

§ 310. **False Return.**—If the sheriff neglects or refuses to fully execute the writ, or makes a false return of his acts thereunder, he is liable to the party aggrieved as for neglect of duty or false return.

CHAPTER XIV.

WRIT OF RESTITUTION.

- § 311. Requirements of the Writ.
- § 312. Writ does not Determine Right of Property.
- § 313. Who the Sheriff may Dispossess.
- § 314. Who are Bound by the Judgment.
- § 315. Who the Sheriff may not Dispossess.
- § 316. Who may be Removed.
- § 317. Notice of Pending Suit.
- § 318. An Evasion of Process.
- § 319. Colorable Possession of Land.
- § 320. Possession of Third Parties.
- § 321. When Mandamus will Issue.
- § 322. Forcible Entry against Sheriff.
- § 323. Must show Right of Occupancy.
- § 324. When Sheriff may Demand Indemnity.
- § 325. Error in Writ.

§ 311. **Requirements of the Writ.**—The writ of restitution requires the officer to place the plaintiff in possession of the premises described therein, and generally to make a money judgment due to plaintiff out of the property of the defendant. It is made returnable within from ten to sixty days. Under it the plaintiff is entitled to immediate possession of the premises and to the money judgment as soon as it can be made.

§ 312. **Writ does not Determine Right of Property.**—The writ of restitution, obtained by the defendants in an action of forcible entry and detainer, does not determine the right of property, or the right of possession. It simply decides a restoration to immediate possession, which has been taken away by an illegal and unwarranted ouster, tending to produce a breach of the peace.

§ 313. **Who the Sheriff may Dispossess.**—What parties can be dispossessed under a writ of *habere facias possessionem* under any and all circumstances, is not very clear upon authority. Some cases go so far as to hold that all persons who enter into possession after the commencement of the action, regardless of how or by what title they entered, must go out, upon the ground that otherwise there might be no end to litigation; while other cases seem to go no further than to hold that the defendant and those entering under or succeeding to him in the possession of the land only need go out, upon the ground that none are affected by the judgment except parties and privies, and that no one can be deprived of his property without first having been allowed his day in court; “and, we apprehend,” say the court in the case of *Long v. Neville*, 29 Cal. 136, “that these two principles, which practically amount to the same thing, together furnish the true test for the solution of every case.”

It is the duty of the sheriff, having the writ of *habere facias possessionem*, to remove all persons who came upon the property after the suit was brought, except a person other than the defendant, who is in possession under a title adverse to the defendant.

Where ejectment is brought against a tenant alone, and pending the action the landlord dispossesses him and leases to another tenant who has no notice of the pendency of the action, it is the duty of the sheriff who receives the writ of *habere facias possessionem* to remove the second tenant.

Willis Long and W. B. Long commenced an action of ejectment against two persons named Hull, who were in the actual possession of the land at the time the action was brought. The Hulls were in possession as tenants of one Ellis, who attempted to intervene by petition, but the plaintiffs demurred, and the demurrer was sustained. The Hulls made default, and judgment was entered against them, and them only, for the possession of the land. Pending the action of ejectment, Ellis brought an action against the Hulls, obtained judgment and dispossessed the Hulls. Afterwards, Ellis leased the land to one Brown, who was in possession at the time the sheriff received the writ. The sheriff refused to execute the writ upon Brown. The Supreme Court held that Brown came in under the same title and held the same right to the possession which was held by the Hulls when the action was commenced against them, and that the sheriff could have lawfully dispossessed Brown, and having failed to do so, he made himself and his sureties liable.

§ 314. **Who Bound by Judgments in Ejectment.**—If a defendant in ejectment conveys the land pending litigation, and the grantee enters upon the land with or without notice of the pending suit, he is not only liable to be dispossessed by the writ of restitution, if the plaintiff obtains judgment, but is also bound by the judgment, as an instrument of evidence,

to the same extent as it would have been binding upon his grantor, had no conveyance been made. (*Watson v. Dowling*, 26 Cal. 125.)

§ 315. **Who Sheriff may not Dispossess.**—A sheriff has no authority by virtue of a writ of restitution to remove from the premises described in the writ persons who were not parties to the judgment on which the writ was issued, and did not enter under defendant in the judgment pending the suit. (*Tevis v. Ellis*, 25 Cal. 515.) Where the owner of certain real estate, who was not a party in the suit, was threatened by the sheriff with ejectment from his land, it was held that he was not entitled to an injunction against the sheriff. The plaintiff and his tenant were not only beyond the reach of the writ, but were unaffected by the judgment as an instrument of evidence, and therefore had nothing to fear from either; that if the sheriff interfered with the plaintiff's possession of the lots, the writ would not only fail as a justification, but would be pertinent to convict the sheriff of an act of official oppression.

In *Watson v. Dowling*, the court held that where several persons are owners of a tract of land as tenants in common, and the interest of one passes to a purchaser under execution sale, who brings ejectment against the execution debtor alone, and recovers judgment, neither the other tenants in common nor the grantees who purchase and enter upon the land pending the suit, can be dispossessed by the sheriff by virtue of the writ of restitution.

Parties in exclusive possession of land, claiming adversely, at the commencement of an ejectment suit to which they were not made parties, are not affected by

the judgment therein. (*McLeran v. McNamara*, filed June 29th, 1882.)

A person in possession of the demanded premises at the time of the commencement of the action to recover possession, cannot be removed under a writ issued on a judgment in the case, unless he is made defendant, and judgment is rendered against him after the court acquires jurisdiction of his person. (*Ford v. Doyle*, 37 Cal. 346.)

If neither the tenant nor his landlord are parties to an action of ejectment, and the landlord was in possession when the suit was commenced, but subsequently leased to the tenant, the tenant cannot rightfully be removed by a writ of restitution issued in such action. (*Calderwood v. Pyser*, 31 Cal. 333.)

One who, after an action of ejectment has been commenced, enters upon the demanded premises, but does not enter under the defendant, or by collusion with him, and is not made a party to the action, cannot be removed by virtue of a writ of restitution issued on a judgment rendered in the action. (*Mayo v. Sprout*, 45 Cal. 99.)

§ 316. **Who may be Removed.**—A party and her tenants, coming into possession of lands, after an action brought to recover possession, under a prior unrecorded deed from two of the defendants in the action, of which plaintiff had no notice when the action was commenced, were properly dispossessed under a writ of restitution, issued on a judgment for plaintiff in said action. (*Mayne v. Jones*, 34 Cal. 483.)

In the case of *Sampson v. Ohleyer*, where, pending an action of ejectment against a tenant, the latter transferred the possession to his landlord, who had actual

notice of and defended the suit, but was not made a party, and plaintiff recovered judgment; it was held that, under the writ of restitution authorized by the judgment, the landlord might be dispossessed.

In ejectment against the occupant of the premises, a judgment of recovery binds not only the defendant but all persons who receive possession of the premises from him with actual notice of the pending suit.

If the plaintiff in ejectment dies after a judgment in his favor has been rendered, a writ of restitution may be issued on the judgment, at the instance and for the benefit of his successor in interest in the property. (Franklin *v.* Merida, 50 Cal. 289.)

Under a writ of possession against the husband, his wife should be dispossessed, her only holding being such as she had by virtue of her marital relations with the defendant in the writ.

§ 317. **Notice of Pending Suit.**—The 27th section of the Practice Act (§ 409, C. C. P.), relating to the filing of *lis pendens*, does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones, or to enforce liens upon legal estates. (Watson *v.* Dowling, 26 Cal. 125.)

§ 318. **An Evasion of Process.**—If the defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained. (Wetherbee *v.* Dunn, 36 Cal. 147.)

§ 319. **Colorable Possession of Land.**—Where a defendant in ejectment has taken possession of land in collusion with the plaintiff, for no other purpose than to afford such plaintiff a pretext to take possession under a writ of restitution, such pretended possession will be disregarded. (*South Beach L. Association v. Christy*, 41 Cal. 501.)

§ 320. **Possession of Third Parties.**—If the plaintiff obtains judgment in an action of forcible entry and detainer, but does not obtain possession of the property, and a writ of restitution is not issued, and the judgment is afterwards reversed, and the action dismissed, and during the pendency of the action third parties obtain possession of the property by collusion with a servant of the defendant, the defendant is not entitled to a writ to be restored to possession as against these third parties. (*Bowers v. Cherokee Bob*, 46 Cal. 280.)

§ 321. **When Mandamus will Issue.**—In an action for a forcible and unlawful entry and detainer of a mine, against a corporation and C. and V., the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: *Held*, that such a verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants, C. and V., and that the corporation did not participate in the trespass.

The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another; and such a verdict is conclusive against the possession of the corporation.

Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory *mandamus* against the sheriff to compel him to execute the writ.

To supersede the remedy by *mandamus*, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application.

Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual. (Fremont *v.* Crippen, 10 Cal. 212.)

§ 322. **When Forcible Entry will not Lie against Sheriff.**—An action under the Act concerning forcible entries and unlawful detainers will not lie against a party who has been put in possession by a sheriff in good faith, by virtue of a writ of restitution, even if the person turned out, and who brings the action, was one whom the officer could not lawfully dispossess by virtue of the writ. (Janson *v.* Brooks, 29 Cal. 214.) Nor is the sheriff guilty of a forcible entry, if acting in good faith, therein.

§ 323. **Must Show Right of Occupancy.**—A person in possession of land where a writ of restitution is served, is presumed to hold under the defendant in the action, and to avoid being dispossessed by the writ, must show affirmatively that he holds by a

right independent and paramount. (*Sampson v. Ohleyer*, 22 Cal. 200.)

§ 324. **When Sheriff may Demand Indemnity Bond.**—When a sheriff goes to execute a writ of possession issued on a judgment in an action to recover land, if he finds other parties in possession than those named in the complaint, who claim that they are rightfully in possession, not in privity with the defendants, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may demand indemnity, and, unless it is given, may refuse to execute the writ. This is the law, even if the premises are specifically described in the writ. (*Long v. Neville*, 36 Cal. 455.)

If a sheriff has wrongfully turned a person out of possession of land under a writ of restitution, he will be restored by the court to the possession, on motion made for that purpose. (*S. B. Land Ass. v. Christy*, 41 Cal. 501; *Mayo v. Sprout*, 45 *Id.* 99.)

§ 325. **Error in Writ.**—In an action of ejectment, if the execution correctly refers to a judgment, in such manner as to identify it, it is sufficient to justify the sheriff in enforcing it, even if it contains an error in reciting the day on which the judgment had been rendered. (*Franklin v. Merida*, 50 Cal. 289.)

CHAPTER XV.

SUITS AGAINST SHERIFFS AND CONSTABLES.

- § 326. Limit of Time for Actions Against Officers.
- § 327. Penalty for not Paying over Moneys.
- § 328. Demand for Property Wrongfully Taken.
- § 329. Sheriff's Notice to Sureties.
- § 330. Defect in Sheriff's Bond.
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- § 332. Officer not Responsible through Laches of Another.
- § 333. Defense in Action for Neglect.
- § 334. Liability of Sheriff's Sureties.
- § 335. Liability of Sureties on Indemnity Bonds.
- § 336. Liability for Illegal Levy.
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- § 339. Justification for Seizure.
- § 340. Duress of Goods.
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- § 344. Action for Trespass.
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- § 346. Violation of Duty by Sheriff.
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- § 348. Conditions of Indemnity Bond.
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- § 350. Judgment against Sheriff.
- § 351. An Estoppel that Protects Sheriff.
- § 352. Simple Trespass.
- § 353. Sheriff Liable for Acts of Deputy.

- § 354. When Judgments cannot be Set Off.
- § 355. Release of Sheriff by Stipulation.
- § 356. Measure of Damages.
- § 357. Offices of Sheriff and Tax Collector Separate.
- § 358. Actions upon Undertakings.

§ 326. **Limit of Time for Actions against Officers.**—An action cannot be commenced after two years against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. An action cannot be commenced after the lapse of one year, against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process. An action cannot be maintained, unless commenced within six months, against an officer, or officer *de facto*, to recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax-collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

It is also held by the Supreme Court that it was not the intention to allow a longer period for commencing an action against a sheriff and his sureties “for a liability incurred by doing an act in his official capacity,” than is allowed for commencing an action against him alone for it.

§ 327. **Penalty for not Paying over Moneys.**—

The statute penalty against sheriffs for the non-payment of moneys collected on execution are only recoverable when the sheriff, by his return, admits the collection of the money, but refuses to pay it over. If it were otherwise, an error in judgment, or even a hesitation to decide between adverse claimants, might work the ruin of any honest and conscientious officer. The statute gives twenty-five per cent. damages on the amount collected, and ten per cent. per month in addition, from the time of the demand. It not unfrequently occurs that a sheriff, on account of contests between creditors, and his own inability to decide the right, declines a demand, which turns out to have been justly and properly made. In such a case, to deprive him of the benefit of his return, and visit upon him the heavy penalties of the statute for failing to pay the money on demand, would be a cruelty and injustice which the law never contemplated. The argument, that sheriffs might avail themselves of this doctrine and make false returns, so as to avoid the penalties of the Act, should be without any weight, and not entitled to consideration. The courts will presume that every officer will faithfully perform his duty, and has done so in every instance, until the contrary is shown.

§ 328. **Demand on Sheriff for Property Wrongfully Taken.**—If a sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit. (*Boulware v. Craddock*, 30 Cal. 190.) The sheriff having misapplied his process, stands in the position of every other trespasser, and is liable to an action the

instant the trespass is committed. The circumstance, that the property may have been in the possession of the execution debtor at the date of the seizure, amounts to nothing except upon proof of fraud or commixture. In the case above cited, the court say: "The rule of the common law is correctly stated in *Ledly v. Hays*, 1 Cal. 160, and the correctness of that decision is impliedly recognized in *Daumiel v. Gorham*, 6 Cal. 44. The statement of facts in *Taylor v. Seymour*, 6 Cal. 512, is imperfect; but if that case is to be understood as laying down a different rule, then we prefer to follow *Ledly v. Hays*."

§ 329. **Sheriff's Notice to Sureties.**—It is of the greatest importance to an officer that the sureties on an indemnity bond given to him, be promptly notified of any suit brought against him by a party claiming property seized under process. § 1055 of the Code of Civil Procedure provides that "if an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs."

If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff cannot afterwards have judgment against the sureties on the indemnifying bond upon a notice of five days, unless he give the sureties written notice of the action brought

against him. He cannot avail himself of this remedy, but is left to his action upon the indemnity bond. (Dennis *v.* Packard, 28 Cal. 101.)

§ 330. **Defect in Sheriff's Bond.**—The defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval, is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law.

Where the obligors, in a sheriff's bond, bind themselves, jointly and severally, in specific sums designated, they may all be joined in the same action, but separate judgments are required.

The sureties of a sheriff are not liable for the penalty imposed upon sheriffs by § 4179 of the Political Code for a neglect to levy upon property. The sureties are liable only for actual damages sustained. (Glascock *v.* Ashman, 52 Cal. 493.)

§ 331. **Remedy Against Sheriff.**—The remedy by motion against a sheriff and his sureties, to compel him to pay over money collected on execution, was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over moneys collected under circumstances of a *bona fide* well-grounded doubt of the authority of the party to demand it. (Wilson *v.* Broder, 10 Cal. 486.)

§ 332. **Officer not Responsible through Laches**

of Another.—It is held, in *Lick v. Madden*, 36 Cal. 208, wherein a county clerk was sued for an alleged failure to perform his duty in the matter of issuing a writ of attachment, that “Although public officers should be made to answer in damages to all persons who may have been injured through their malfeasance, omission, or neglect, but if the damages would have been sustained, notwithstanding the malconduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officer cannot be held responsible.”

§ 333. **Defense in Action Against Sheriff for Neglect.**—In an action against a sheriff for refusing to levy an attachment on certain property as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried before a sheriff’s jury, and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer. (*Strong v. Patterson*, 6 Cal. 156.) As under the statute, the plaintiff, after the introduction of such testimony, would be bound to show that he had tendered an indemnity bond, he may well complain that he is taken by surprise, the issues not being tendered by the pleadings. The objection to the introduction of such testimony on the ground that it is irrelevant, is sufficient.

§ 334. **Liability of Sheriff’s Sureties.**—Sureties on the sheriff’s official bond in this State are entitled to stand upon the precise terms of their contract, by which they stipulate for his official, not his personal, dealings. In the case of *Schloss v. White*, sheriff, 16

Cal. 68, suit brought on a sheriff's bond against the officer and his sureties, the plaintiff sued out attachment against one Kalkmann, and had it levied on some goods. Other creditors issued similar process, also levied on the same goods; and afterwards the plaintiff dismissed his proceeding, and claimed that the goods levied on, or a part of them, were his own property, they having been procured by Kalkmann by false pretenses. The plaintiff sued the sheriff in replevin. He did not take the goods out of the sheriff's possession, but came to an arrangement with the sheriff, whereby the sheriff agreed to sell the goods and keep the proceeds to answer the judgment, if the plaintiff obtained one in his replevin suit. The sheriff sold the goods and paid the money into court, saying nothing about this arrangement; and the money was paid, under the order of the court, on the claim of the other creditors. The court held as follows: "The sureties of the sheriff had nothing to do with and gave no sanction to this arrangement. The question is, are they bound to the plaintiff for the goods or the money received from the sale—the plaintiff having obtained judgment in the replevin suit? We think they are not. It was no part of the sheriff's duty to make this agreement with the plaintiff to sell the goods and to hold the proceeds for the plaintiff in a certain event. He had no legal authority, as sheriff, to sell these goods and to hold the money on bailment for the plaintiff. If the plaintiff trusted him with the custody of the goods, and gave him authority to sell them, he became, so far, the agent of the plaintiff, and the plaintiff must look to him merely as his agent; he cannot hold the sureties bound for executory contracts of this sort, entered into without their consent. If so, there would be scarcely a limit to

their responsibility ; for contracts of this sort might run for years, and represent every variety of complication. If the sheriff had retained the goods, he might have obtained a bond of indemnity from the other creditors ; or if the plaintiff had given bond, he might have relieved the sheriff from the custody of the goods. But here, the sheriff assumes, by this agency, a responsibility for himself and his sureties, greater in degree and different in kind from that imposed by law, and it would be unjust and impolitic to encourage such dealings by holding sureties responsible for them."

§ 335. **Liability of Sureties on Indemnity Bonds.**—Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. (*White v. Fratt*, 13 Cal. 521.) Where an indemnity bond is given to a sheriff to hold him harmless, and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie.

A bond was given by a plaintiff to a constable to indemnify him from liability for selling certain property claimed and actually owned by persons other than the execution debtor ; and the property having been sold, and the owners having sued the constable and recovered judgment against him, the latter assigned the

bond to them, and they released him from liability on the judgment: *Held* (in *McBeth v. McIntyre*, 57 Cal. 49), that the release of the constable did not operate to release the obligors on the bond. Substantially, the constable paid the judgment against him, by assigning the bond.

In an action by a sheriff on an indemnity bond, it appeared that after its execution the bond had been altered by substituting "C. J. Hubner" for "J. M. Berry," as the claimant of the property seized by the sheriff, and afterwards and before the trial, by erasing the former and restoring the latter name, thus restoring it to its original condition; but there was no allegation or proof that the alterations were made with a fraudulent design, or that the defendants could possibly be injured by them: *Held* (*Rogers v. Shaw*, 59 Cal. 260), that the alterations did not render the instrument void.

§ 336. **Illegal Levy.**—If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. He has become a trespasser, as against the rights of the owner of the property. The statute allows him to try the rights of property and the protection of an indemnity bond. The procedure in such cases has been pointed out elsewhere in this volume. If he cannot safely hold the property he is entitled to indemnity from the plaintiff. He has no protection by the verdict of a jury on the trial of the rights of property under the provisions of §§ 549 and 689 of the Code of Civil Procedure, as such proceedings are not judicial. If the sheriff take property not belonging to the defendant in the writ,

whether in his possession or not, the taking is tortious.

§ 337. **When Previous Demand not Necessary.**—If the original possession of property is acquired by a tort, no demand previous to the institution of a suit is necessary. (*Sargent v. Sturm*, 23 Cal. 359.) Affirmed in *Wellman v. English*, 38 Cal. 584. See also *Boulware v. Craddock*, 30 Cal. 190, which overrules all cases subsequent to and in conflict with *Ledly v. Hays*, 1 Cal. 160, on this point. In the case of *Paige v. O'Neal*, 12 Cal. 483, the court declares:

“It was not essential to aver a demand of the defendant of the wheat in controversy in the complaint, or to prove a demand on the trial. If the property in fact belonged to the plaintiff—and it is upon this theory the suit is brought, and to this effect the evidence tended when the plaintiff rested—the seizure by the defendant was tortious; and it is a general rule that where the possession of property is originally acquired by a tort, no demand previous to the institution of a suit for its recovery is necessary. It is only when the 'original possession is lawful, and the action relies upon the unlawful detention, that a demand is required.”

In the case of *Woodworth v. Knowlton*, 22 Cal. 169, the court say: “The evidence and pleadings show clearly that the plaintiff was the owner of the property, and in possession at the time of the levy of the attachment, and we see nothing in the evidence showing a right of possession in any person other than the plaintiff at the time of the commencement of the suit. The attachment gave the defendant no authority to take the property owned by the plaintiff, and his seizure of the property was

therefore wrongful and unlawful. If any demand whatever was necessary in this case, which is not very clear, it was sufficient to make that demand of the party in actual possession, and who was able to comply with it, and it would have been but an idle ceremony to make the demand of Atherton or Griffin, who could not have complied with it had they been willing to do so."

§ 338. **When Demand Necessary.**—In the case of *Kelley v. Scannell*, 12 Cal. 73, the Supreme Court held that notice of claim and demand for the property was necessary on the part of the claimant. This was an action to recover the possession or the value of certain personal property, comprising the furniture, fixtures, and stock of the "Empire State Saloon." The property was on the 19th of February, 1857, seized by the defendant as sheriff of San Francisco county, under an attachment against one Wilson. Prior to the seizure of the property by the defendant, the plaintiff, by an instrument in writing, bargained and sold the property to Wilson, and, by the terms of the agreement, the property was to be delivered and paid for on the 14th of February, 1857. On that day Wilson paid a part of the purchase-money, and the time for the payment of the balance was extended to February 24th. On the 14th of February, Wilson and one Kirk were in possession of the property, and appear to have been the proprietors of the saloon. This possession continued up to the time of the seizure of the property of the defendant as sheriff. The plaintiff's complaint contains no allegation, nor was there any proof on his part, of notice of his claim or demand of the property, prior to the bring-

ing of this action. Plaintiff had judgment in the 4th District Court, and the Supreme Court granted a new trial, holding that "defendant having seized the property by virtue of his office and process, while in the possession of the party defendant mentioned in the writ, was entitled to notice and demand from plaintiff before he can be held liable to an action for the possession or value."

Where, at the time of the levy of a second execution (the first having been quashed), the goods first levied upon had passed by sale to a third party, and were mixed with other goods subsequently purchased, which last goods were alleged to be liable to the execution, it was held, in the case of *Wellington v. Sedgwick*, 12 Cal. 470, that if they were so mixed or confounded with other goods as that they could not be identified or distinguished, and Wellington failed to point out to the sheriff, or designate the goods which were not subject to execution, the sheriff could not be liable for levying on the whole. But the sheriff would be bound, after the levy, on notice to him of the goods not liable, to restore them; but this notice must be specific, apprising him of, and designating, the particular goods improperly seized, and must be given previously to suit brought.

§ 339. **Justification for Seizure.**—An officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint.

The general denial only puts in issue the allegations of the complaint. New matter must be specially

pleaded, and new matter is that which the defendant must affirmatively establish. (*Glazer v. Clift*, 10 Cal. 304.)

Where, in an action against the sheriff for taking goods, he justifies under an attachment against a third person, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, held to be sufficient. (*Towdy v. Ellis*, 22 Cal. 651.)

When property is taken from the possession of the defendant by the officer levying thereon, it is sufficient to introduce (in suit against the sheriff), in evidence, the attachment or execution under which the levy is made; but when found in the possession of a stranger claiming title to the property so seized, it is likewise necessary to show a judgment, or prove the debt for which judgment is demanded in the attachment suit. (*Sexey v. Adkinson*, 34 Cal. 346.)

If an officer seizes the property of the debtor, and the writ be regular on its face, it is a sufficient justification to him; for the defendant may, if the attachment has been improvidently issued, move to have it quashed or bring a suit upon the undertaking; but a third party, a stranger to the record, could not interfere, and, therefore, it would seem but justice, that before any right could be established against him, by reason of a proceeding to which he was not a party, that its regularity should be shown. An officer who seizes property in the hands of the debtor, may justify under the execution or process; but when he takes property from a third person, who claims to be the owner

thereof, he must show the judgment and execution ; if an attachment, the writ of attachment and the proceedings on which it was based.

In the case of *Norcross v. Nunan*, sheriff, etc., (opinion filed November 2, 1882), which was an action for the recovery of personal property or its value, and for damages for its detention, the court below refused to admit the writ of attachment in evidence. On appeal Mr. Justice Myrick delivered the following opinion of the court: "This was an action for the recovery of personal property or its value, and for damages for its detention. But the plaintiff did not claim the delivery of the property to him before judgment. The defendant, sheriff, justified under a writ of attachment and an execution.

"1. Conceding that the court below was correct in refusing to admit the writ of attachment in evidence because of the defect in the affidavit, in stating that the amount claimed was due upon either an express or implied contract, yet the defendant was entitled to have the execution in evidence upon which to base the defense that the transfer of the property from Gordon and Cory to plaintiff was fraudulent and void as to creditors. We think the evidence of the plaintiff clearly shows that the transfer was void as to creditors. (§ 3440, Civil Code.) The sheriff did not take the property from the possession of plaintiff; and even if there were irregularities in the proceedings for the judgment, such irregularities would not prevent the officer from justifying under an execution valid on its face. There is nothing on the face of the execution to show its invalidity. The rule is fully stated in *Freeman on Executions*, § 101.

"The sheriff may limit his inquiries to an inspec-

tion of the writ. If the writ is issued by the proper officer, in due form, and appears to proceed from a court competent to exercise jurisdiction over the subject-matter of the suit ; to grant the relief granted and enforce it by the writ issued ; and there is nothing on the face of the writ showing a want of jurisdiction over the person of the defendant, or showing the writ to be clearly illegal from some other cause, the officer may safely proceed. That from some cause not shown in the writ, the judgment or writ was irregular or void, will be of no consequence to him. He can justify upon producing the writ. It is therefore immaterial to him that the judgment does not correspond to the writ or that there ever was any such judgment in existence.'

" The same rule applies to a court of limited jurisdiction, if the subject-matter of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the person was not also within it. (Savacool v. Boughton, 5 Wend. 170.)

" 2. The court instructed the jury to render a verdict for plaintiff for the property, and to find the value of the property and the damages. The jury found the value of the property and the damages, and returned a verdict for the plaintiff for such value and damages, but did not find for the plaintiff for the property. This was error. Under this verdict and the judgment thereon the defendant could not have elected to deliver the property.

" Judgment and order reversed and cause remanded for a new trial."

A sheriff makes out a *prima facie* case of justification of the seizure of property under a writ of attachment, by the production of the writ and affidavit

on which it was issued, notwithstanding the affidavit was originally insufficient, and was amended subsequent to the seizure, if the property was in possession of the defendant and attached as his property. (*Babe v. Coyne*, 53 Cal. 261.)

§ 340. **Duress of Goods.**—The issue of an attachment and a levy of the same on goods, if there is a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized. (*Kohler v. Wells, Fargo & Co.*, 26 Cal. 606.) Proof of injury to plaintiff's business as a criterion of damages is inadmissible.

§ 341. **Estoppel of Owner of Attached Property.**—Where A., the owner of property, represents that certain property in his possession belongs to B., and that representation coming to the ears of C., a creditor of B., who sues out an attachment against B., and seizes the property: *Held*, that A. is estopped from setting up a claim to the property. (*Mitchell v. Reed*, 9 Cal. 204.)

In so deciding, the court said: "If parties choose to make untrue statements, by which others are injured, they should be estopped to unsay what they have before said. Estoppels, in general, are odious; but in mercantile and ordinary business transactions, where men must trust to appearances and the declarations of parties, because they have no other means of information in such cases, the courts have been inclined to extend the list of estoppels."

§ 342. **Receipt to Sheriff as Estoppel.**—One

who, with knowledge of all the facts and circumstances surrounding the transaction, gives to the sheriff an accountable receipt for property levied upon as the property of another, is estopped from afterwards asserting ownership in himself, unless at or before the giving of the receipt he made known his claim to the officer. (*Bleven v. Freer*, 10 Cal. 172; *Dresbach v. Minnis*, 45 Cal. 223.)

§ 343. **Liability of Officer for Trespass, and Sureties on Official Bond.**—Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. (*Van Pelt v. Littler*, 14 Cal. 194.) An action on the official bond of an officer lies primarily upon the breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not—the result of the non-feasance or mis-feasance of the officer. In the decision here cited, the suit was brought upon the official bond of a constable, against the officer and his sureties, to recover damages for an illegal seizure of the property of the plaintiff, under an execution against other parties. It was contended that the suit was improperly brought upon the official bond of the constable; that the sureties are not liable on the bond on the first instance, and that the only remedy primarily is an action of trespass against the officer alone. The condition of the bond being, that the officer shall well and faithfully discharge the duties of his office, it was held that there could be nothing in that point. The bond is a contract by which the officer and his sureties, in effect, covenant and agree, not only that the officer will faithfully perform the duties enjoined by law, but

that he will not, by virtue, or under color of his office, commit any illegal or improper act. It is no answer to an action upon the official bond of an officer, that the party complaining has not chosen to pursue some other equally available and proper remedy.

The law is well settled, that a sheriff is answerable for the wrongful acts of his deputy, committed under color of his office, and in the pretended discharge of his duty. If the deputy levy an execution against A. upon the property of B., the sheriff is liable; and he is liable not only in a private and individual capacity, but in his public and official character, and upon his official bond. This liability rests alone upon the ground of the official relation existing between the parties, and can be enforced only as to such acts of the deputy as are connected with the performance of his official duty. He is no more answerable for a naked trespass committed by the deputy than any other person, but the wrongful acts of the deputy, done under color of process, are deemed official, and for such acts he is liable. This being admitted, and its correctness seems never to have been questioned, it is difficult to perceive any satisfactory reason why similar acts of the sheriff himself should not be held of the same character, in order to charge his sureties. Our statute makes no distinction between the liability of a sheriff and a constable. The legislature intended that the officer and his sureties should be responsible for every abuse of his official powers, and there could not well be a more flagrant abuse of such powers than the seizing and selling of the property of one person under and by virtue of an execution against another. He does not act in

such a case in a private and individual capacity, but as an officer, clothed with official authority, and protected by the judgment of a court and the process which he intends to execute. No resistance can lawfully be made by any person whose property is thus taken. The property itself may be detained whether legally taken or not, and a summary mode is provided for the protection of the officer, to determine disputes in regard to the title. "To hold that such an act is not official," say the court in the case above cited, "at least so far as to charge the sureties, it appears to us, would be in contravention of the spirit and intention of the statute, and would certainly operate most unjustly upon persons whose property may be taken by an officer who is insolvent and unable to respond in damages for its value."

In a suit brought on the official bond of defendant, Webster, who was sheriff of San Joaquin county, against Webster and his sureties, to recover damages for the levy by Webster on property of one Pico, which levy was made under color of process, it was held (*Pico v. Webster*, 14 Cal. 203,) that, where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety.

But, in the case of official bonds, the sureties undertake in general terms that the principal will perform his official duties; and a judgment against the officer, in a suit to which they were not parties, is not evidence against them.

§ 344. **Action for Trespass.**—In an action for trespass (*Pacheco v. Hunsacker*, 14 Cal. 120,) brought by one Pacheco against Hunsacker, as sheriff, for

seizing and taking away certain grain, the property of plaintiff, the defendant admitted the seizure, averring that it was done by virtue of a writ of attachment issued at the suit of Dutil *v.* Andeque; that he sold the undivided two-thirds interest in the wheat, as perishable property, for \$495; that at the time of the seizure, Andeque had a leviable interest in the wheat, and that Dutil was a *bona fide* creditor. The wheat was in five stacks, and was left by the sheriff in charge of a keeper until the day of sale. At the sale, the sheriff announced that he only sold the undivided two-thirds interest of Andeque. Pacheco was present and notified the sheriff that, if he sold, he, Pacheco, would abandon his one-third and claim the whole value of the sheriff. The purchaser at the sale afterwards went on to the land, threshed out the whole of the five stacks, and kept the wheat. The sheriff retained the \$495, to abide the event of this suit. A few days before the seizure by the sheriff, Andeque sold to Pacheco these five stacks, pointing them out specifically, executed a bill of sale, left the ranch, and did not return.

The court below, among other things, instructed the jury that the plaintiff was entitled to recover, if at all, the value of all the grain taken. The jury found for plaintiff \$1457. Judgment was rendered accordingly, and defendant appealed. The Supreme Court held that the delivery and change of possession was sufficient, and that plaintiff was entitled to the value of all the grain taken.

§ 345. **Bond to Indemnify Sheriff for Unlawful Act.**—A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution in

violation of an order enjoining its sale, is void, because an unlawful contract. (*Buffendeau v. Brooks*, 28 Cal. 642.) In this case, the judgment had been set aside and a temporary injunction issued. The bond was dated June 16th, but was not delivered to the sheriff until June 28th, the day of the sale. The sheriff erroneously supposed that the bond would indemnify him for selling, notwithstanding the restraining order.

§ 346. **Violation of Duty by Sheriff.**—Personal property which is exempt from forced sale on execution is none the less exempt because the judgment debtor owns an undivided interest in it in common with a stranger to the judgment; and where a sheriff, on ascertaining that property which has been attached is exempt from execution, refuses to release it without an undertaking, he exceeds his authority and violates his duty. Such an undertaking is void for want of consideration, and for having been illegally exacted by the sheriff under color of his office. It is the duty of the sheriff to release exempt property, without an undertaking. (*Servanti v. Lusk*, 43 Cal. 238.)

§ 347. **Agreement to Indemnify Sheriff.**—An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right; but an agreement to indemnify a party for a willful trespass about to be committed is against public policy and void. In the case of *Stark, sheriff, v. Raney*, 18 Cal. 622, wherein the sheriff seized and sold a wagon on execution in favor of Raney, who pointed out the wagon, requested the sheriff to seize it, and verbally agreed to hold him harmless, etc., it was held, in a suit by the

sheriff against Raney, for damages recovered against the sheriff, for the seizure, that the agreement to indemnify is valid; that it was not a "special promise to answer for the debt, default, or miscarriage of another," within the Statute of Frauds—because the sheriff was acting not for himself, but as agent of Raney, and the promise was to be responsible for his acts as such agent. It was held, further, that the sheriff was entitled to recover, not simply the value of the property which he had been compelled to pay, but also the costs incurred by him in defending the suit brought to recover such value; that his claim to indemnity extends to the entire damages to which he had been subjected on account of the seizure.

§ 348. **Conditions of Indemnity Bond.**—If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come to be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. (*Lot v. Mitchell*, 32 Cal. 24.) In this case the obligors do not undertake anything except that they will indemnify the sheriff from any actual damage that he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him.

When a sheriff takes an indemnity bond against the claim of a third party, in attachment or execution, and it is provided in the bond that the officer may retain for a reasonable time, as additional security against

such claim, all moneys that may come into his hands by reason of said attachment or any execution in said action, the term "reasonable time" will enable the officer to retain such moneys until the determination of any suit that has been brought against him therein by the claimant. (*Scherr v. Little*, filed June 28th, 1882.)

§ 349. **Plaintiff Bound by his Bond.**—In the case of *Graves v. Moore*, 58 Cal. 435, the plaintiff, as sheriff, under an execution in favor of the defendants, Moore, Hunt & Co., levied on certain personal property, including a billiard table; but, before the sale, Strahle & Co., and also one Soberanes, each claimed the property pursuant to § 689 of the Code of Civil Procedure. The sheriff sent written notice of the claim made by Soberanes, and also (it was claimed) of the claim of Strahle & Co., to Moore, Hunt & Co., who delivered to the sheriff an indemnity bond against the claim of Soberanes, and ordered him to sell. After the sale, Strahle & Co. sued the sheriff for the value of the property, which was paid. In an action brought by the sheriff to recover the amount of the judgment, also \$100 paid as counsel fees, the court found, among other facts, that the plaintiff notified the defendants of the claim of Strahle & Co., and was thereupon directed to sell. It appears that upon being served with the summons in the suit brought against him by Strahle & Co., the sheriff notified the attorney of Moore, Hunt & Co., who appeared in the action, but afterwards abandoned the same, and notified the sheriff that they would make no further defense. The court found that the officer was entitled to recover, not only the amount of the judgment, but also counsel fees, because Moore,

Hunt & Co., by their agreement of indemnity, engaged to save the sheriff from the legal consequences of selling the property of the claimant, and their engagement applied not only to the act of selling, but to all the consequences resulting to him from that act. (Civil Code, §§ 2772, 2775.) Having been compelled to pay by the judgment against him, he has a right to recover not only the amount of the judgment, but the expenses attending the action which he had to defend. (*Duffield v. Scott*, 3 T. R. 374; *Stark v. Raney*, 18 Cal. 622.)

The judgment against the sureties is conclusive evidence of his right to recover against them on the bond of indemnity, nor can they complain, as by virtue of § 387, Code of Civil Procedure, the sureties have the right to intervene in the suit against the officer and defend the suit as a party to the record.

§ 350. **Judgment against Sheriff.**—The provision of the statute making the judgment, in an action against a sheriff, conclusive evidence against his indemnifier, where the latter has been notified of the action, is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier—the real party in interest—and that he has in that action an opportunity to make any defense that may exist. Where, therefore, the indemnifier has been notified of the action against the sheriff, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as real party defendant to the first action. (*Dutil v. Pacheco*, 21 Cal. 442.)

§ 351. **An Estoppel that Protects the Sheriff.**—

If a court or referee, on proceedings supplementary to execution, orders property of the judgment debtor to be delivered up to the sheriff to be sold on the execution, the judgment creditor is estopped by the order from maintaining an action against the sheriff for selling the property. (*McCullough v. Clark*, 41 Cal. 304.) In this case the judgment debtor had an insurance policy which he claimed to be exempt from execution. The court decided that that particular policy was not exempt, and that the sheriff, in seeking to apply it toward the payment of the judgment, in obedience to that order of the court, was only performing a duty enjoined upon him by law, and, therefore, could not be treated as a wrong-doer.

§ 352. **Simple Trespass.**—In the case of *Selden v. Cashman*, 20 Cal. 67, action for damages for trespass, for the seizure of a stock of goods under an execution issued upon a void judgment, the court held that the fact of the invalidity of the judgment was not sufficient to warrant the conclusion that the seizure was malicious. There was nothing extraordinary attending the seizure, and the course ordinarily adopted in such cases seems to have been substantially pursued. The seizure was undoubtedly a hardship upon the plaintiff, but there was no evidence of any wrongful design or willful misconduct tending to aggravate the offense. The case presented was that of a simple trespass, and the court below acted properly in refusing to allow exemplary damages.

To maintain *trover* or *trespass de bonis asportatis*, evidence of an actual forcible dispossession of the plaintiff is not necessary. Any unlawful interference with the property, or exercise of dominion over it, by

which the owner is damnified, is sufficient to maintain either action. It was held, accordingly, in *Rider v. Edgar*, 54 Cal. 127, in an action by a mortgagee of personal property against a sheriff, for taking the same under attachments against the mortgagor, that a levy upon a part of the property in the possession of the mortgagor, and the appointment of a keeper, was a *taking*, although the property was not moved or otherwise disturbed, and though it was released before any demand from the plaintiff.

§ 353. **Sheriff Liable for Acts of Deputy.**—In an action of trespass against a sheriff, where he is declared against personally and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy as such committed the trespass. The sheriff is liable for the acts of his deputy. In such a case, it is not necessary to prove that the defendant directed his deputy to seize the particular property in question, in order to hold the defendant liable. (*Poinsett v. Taylor*, 6 Cal. 78.)

§ 354. **When Judgments cannot be Set Off.**—A sheriff will not be allowed to take advantage of his own wrong, and by an illegal act defeat the purpose of the statute. In the case of *Beckman v. Manlove*, sheriff, 18 Cal. 389, plaintiff recovered judgment against defendant for seizing, as sheriff, under execution, certain exempt property. Defendant then procured an assignment to him of the judgment on which the execution issued, and moved the court to set off this latter judgment against the former: *Held*, that the motion was properly denied; that defendant being sued as a wrongdoer, the judgment of plaintiff for the value of the

property must, as between plaintiff and defendant, be regarded as standing in place of the property; and that if defendant were allowed in this way to take advantage of his own wrong, he would practically defeat the purpose of the Exemption Law.

§ 355. **Release of Sheriff by Stipulation.**—Where an action of replevin is brought to recover property in the possession of a sheriff under attachment, and the parties stipulate that the property shall be turned over to a third party to await the final judgment in the cause, the sheriff is released from all liability, and a judgment *in form* only can be taken against him. (Temple *v.* Alexander, 53 Cal. 3.)

§ 356. **Measure of Damages for Detaining Personal Property.**—In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property, with interest. If circumstances of aggravation be shown in order to increase the damages, then defendant may show all circumstances connected with his acts, and explanatory of his motives and intentions. In such actions, the rule of damages depends on the presence or absence of circumstances of aggravation in the trespass, as fraud, malice, or oppression. In the absence of such circumstances, the rule is compensation merely, and this refers solely to the injury done to the property, and not to collateral or consequential damages resulting to the owner. And the measure of relief is matter of law. But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great

hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages.

The rule of compensation merely, as distinguished from the rule of exemplary damages, applies, even though the writ, under which the officer committed the trespass, were void—there being no circumstances of aggravation. (*Dorsey v. Manlove*, 14 Cal. 553.)

In actions for the conversion of personal property, plaintiff is entitled to recover the value of the property, and, in addition thereto, vindictive damages, if the injury was wanton or malicious; and the value must be the wholesale market value.

In an action against a sheriff for wrongfully seizing and selling property, under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. (*Phelps v. Owens*, 11 Cal. 25.)

The rule giving vindictive or exemplary damages in cases of malicious trespass, applies as well to officers of the law, acting under color of process, as to private persons. (*Nightingale v. Scannell*, 18 Cal. 315.)

In suit against a sheriff and the plaintiff in a judgment for a wrongful seizure of property on an execution upon such judgment, the sheriff, who acted without improper motives, cannot be made liable in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. The motives of plaintiff cannot be given in evidence in aggravation of damages against the sheriff. *Id.*

In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. (Coghill v. Boring, sheriff, 15 Cal. 213.) The rule is, where the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of conversion. When the value is fluctuating, the plaintiff may recover the highest market value at the time of the conversion, or at any time afterwards. (Hamer v. Hathaway, 33 Cal. 117.)

§ 357. **Offices of Sheriff and Tax Collector Separate.**—The offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. They are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations belonging to the other. (People v. Edwards, 9 Cal. 286.)

§ 358. **Actions upon Undertakings.**—Instances of disastrous results from loosely drawn complaints in actions to recover upon undertakings given to prevent the levy and for the release of attachments, have so frequently met the eye of the writer in looking through the California Reports for decisions relating to the duties of sheriffs and constables and pertaining to legal process, that a word or two upon that subject is deemed not out of place in this work. If the complaint does not aver either that the giving

of the undertaking sued on prevented the levy of the attachment, or that the property was released upon the giving of the undertaking, it fails to aver the very gravamen and essential gist of the cause of action itself. In an action upon an undertaking given to prevent the levy of an attachment, in the case of *Coburn v. Pearson*, 57 Cal. 306, the complaint stated that the sheriff did proceed to levy upon and attach certain personal property; and that before the completion of said levy, the defendants, for the purpose of preventing the levy or the completion thereof, tendered the sheriff the undertaking required by law, etc., which undertaking was duly taken and accepted by the sheriff. It was held that the complaint was defective in not stating that the sheriff did not complete the levy, or that he proceeded no further therewith. In this case the court said:

“Assuming that the words ‘did proceed to levy upon,’ etc., do not necessarily imply that the sheriff took the property into his possession (and any acts clearly indicating his purpose to subject it to his control, would give the sheriff the legal possession as against the defendant in attachment), the complaint contains no averment that the sheriff did not ‘complete’ the levy, or that he proceeded no further therewith. This would seem to be necessary. It is urged that the averment that the sheriff duly took and accepted the undertaking is sufficient, inasmuch as that it will be presumed that the sheriff did his duty, and that he would not have taken the undertaking and *also* the property. But such presumptions are applied, in proper cases, as a rule of evidence, not of pleading. A party must allege the material ultimate facts, even although some other

fact, if proven, might create a presumption of the existence of one of the facts alleged. Besides, here, there can be no doubt that the burden was cast on plaintiff at the trial to prove the cessation of proceedings towards a levy, or a return of the property to the extent to which a caption had been effected. Otherwise, the consideration of the undertaking (not under seal) would not be proven. In *Palmer v. Melvin*, 6 Cal. 651, it was held that a complaint upon a bond given to *release* property from attachment was defective, because it did not aver that the property was released upon the delivery of the bond." The court said: "It is necessary to allege the consideration for the undertaking, and a mere reference to the condition of the bond is insufficient." The same rule is laid down in *Williamson v. Blattan*, 9 Cal. 500, where the court says, further, "that the failure to allege the release of the property may be taken advantage of by *general demurrer*." In *Nickerson v. Chatterton*, 7 Cal. 568, it was held, that in an action against the sureties on a replevin bond, it is necessary to allege that the property was delivered to the party for whom the bond was given; in *Los Angeles v. Babcock*, 45 Cal. 252, that in a suit on a bail bond the complaint must allege that the person bailed was released from custody; in *Jenner v. Stroh*, 52 Cal. 504, that when action was commenced on an undertaking given to procure the vacation of a *default judgment*, the complaint should have averred that the judgment was set aside. In such cases, the consideration for which the undertaking is executed and delivered must be alleged and proved.

CHAPTER XVI.

SHERIFFS' FEES.

- § 359. Fees Allowed by Court.
- § 359. Attorney cannot Bind Client for Certain Fees.
- § 360. Commissions on Execution.
- § 361. Care of Court House.
- § 362. Prepayment of Fees.
- § 363. Complaint in Action for Fees.
- § 364. Fees in Change of Venue.
- § 365. In Habeas Corpus.
- § 366. Fees for Copies.
- § 367. Official Duty of Sheriffs.
- § 368. Illegal Fees.
- § 369. Separate Charges for Separate Acts.
- § 370. Mileage for Conveying Prisoners.
- § 371. Officer may have Execution for Fees.

§ 359. **Fees Allowed by Court.**—Every officer is presumed to be familiar with the fee bill of his own county. The fees chargeable are fixed by statute, with the exception of such as accrue in the taking and keeping possession and preserving property under attachment, or execution, or other process. The provision of the statute allowing the officer in those expenditures “such sum as the court shall order,” provided that no more than \$3 per diem shall be allowed to a keeper (statutes 1869-70, p. 158,) should be borne in mind in all cases where expenses of this

kind are incurred. The property must be safely kept, and the officer will not be refused reasonable compensation therefor. But to enable him to collect such expenses, he must comply with the requirements of the law which allows him such reimbursement. In the case of *Bower v. Rankin*, on appeal to the Supreme Court, in which the opinion was filed July 27, 1882, the cause was remanded with directions to the court below to enter a judgment for plaintiff for the principal sum sued for and \$26.10 sheriff's costs—refusing to allow the officer's costs for keeping the property, amounting to \$1644, for the reason that no allowance had been made by the court to the sheriff "for his trouble and expense in taking and keeping possession of and preserving the property" under the attachment.

An attorney has no authority under the law to bind his client for the payment of keeper's fees. A decision of the Supreme Court to this effect will be found in the chapter relating to Attachments of Personal Property.

In the case of *Geil v. Stevens*, 48 Cal, 590, the court held that a sheriff is not entitled to keeper's fees, or the expense of feeding stock under attachment, unless the court from which the writ issues certifies that the charges are just and reasonable.

§ 360. Sheriffs' Commissions must be Paid, whether Sale is made or not.—If an execution is placed in the sheriff's hands, and he advertises property for sale, and the judgment debtor pays the full amount of the judgment to the judgment creditor before sale, he cannot deprive the sheriff of his fees, but is liable to him for the fees allowed in case of a sale. (*Morse v. Gibbons*, 43 Cal. 377.) And this

compensation attaches the moment any act is done under the execution or order by the sheriff.

§ 361. **Care of Court House.**—A sheriff cannot maintain an action against a county for compensation for “taking care of the court house, and keeping and guarding the jail of the county during his incumbency of the office of sheriff.” The law fixes his compensation for the performance of such official duty. (*Stockton v. Shasta Co.*, 11 Cal. 114.)

§ 362. **Prepayment of Officers' Fees.**—The statute which declares that “any officer *may refuse* to perform any services in a civil action or proceeding, until the fee for such service is paid,” is not to be construed as prohibiting the officer from performing the service without prepayment of fees, but as permissive merely, leaving the alternatives of cash in advance or credit to his own election; but if, when services are demanded of an officer in a civil case, he fails to demand his fees in advance, his obligation to perform the duty required is the same as it would be if the fees were prepaid or tendered in advance. (*Lick v. Madden*, 25 Cal. 203.)

§ 363. **Complaint in Action for Fees.**—In a complaint in an action brought by a sheriff for official services in levying an execution, it is not necessary to aver the value of the services rendered, as the law fixes their value. In such complaint it is not necessary to allege a demand. An allegation of a special request by the defendant, that the plaintiff should perform the services, is sufficient; nor is it necessary to aver that the sums due the plaintiff were not collected by

the sheriff by a sale of the property levied on. (Lane *v.* McElhany, 49 Cal. 421.)

In an action by a sheriff, to recover for his services in keeping property levied on by virtue of an execution, the complaint is insufficient which neither avers what the services were reasonably worth, nor that the court, from which the execution issued, had certified that the amount was just and reasonable, and such certificate is the proper evidence of the value of the services. *Id.*

In the case of Lane *v.* McElhany, 49 Cal. 424, the court remanded the cause with directions to the court below to modify the judgment, so that the recovery of the plaintiff should be for the sum of \$24 only, striking out keeper's fees amounting to \$565, because plaintiff had neglected to aver in the complaint what the services were reasonably worth, and there was no certificate of the court fixing an allowance for keeper's fees.

§ 364. **Sheriffs' Fees in Change of Venue.**—Under the Act of 1851, concerning the costs of criminal actions, if a case is removed from the county where the indictment was found, for trial in another county, the county where the indictment was found is liable for the fees of the sheriff of the county to which the cause was removed. The above Act is still in force thus far, and was not repealed by the Penal Code.

§ 365. **No Charge for Habeas Corpus.**—An officer cannot charge fees for serving a writ of habeas corpus. No fees or compensation of any kind must be received by an officer for duties per-

formed or services rendered in proceedings on habeas corpus. (See § 4333, Political Code.)

§ 366. **Sheriff must Charge Fees for Copies.**—Under the Act of 1857, "Regulating Fees of Office in Certain Counties," the sheriff may charge fees for copies of the summons and injunction served by him in a suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid to the sheriff. There is no necessity for plaintiff to obtain copies of summons and injunction from the clerk; so held in *Edmondson v. Mason*, 16 Cal. 387. The officer cannot be deprived of his legal fees, because the party for greater dispatch, or any other cause, saw fit to prepare the copies himself, or have them prepared elsewhere. Where the sheriff's office is salaried, he must collect all fees due the county.

§ 367. **Official Duty of Sheriffs.**—The duty imposed by the statute on sheriffs to take prisoners to the State prison, and insane persons to the insane asylum, is an official duty, and none the less so because some portion of it must be performed without the limits of the county. (*Adams v. The City and County of San Francisco*, 50 Cal. 117.)

§ 368. **Charging Illegal Fees.**—Before an officer can be removed from office and fined under the provisions of § 772 of the Penal Code, for charging and

receiving illegal fees, the court must find that such fees were knowingly, willfully, or corruptly taken. (*Triplett v. Munter*, 50 Cal. 644.) "The provision referred to" say the court, "is highly penal in its nature; and though the statute does not in terms require that the wrongful act must have been knowingly and corruptly done, we are satisfied that it was not the intention of the legislature to visit with this severe penalty an act performed by an officer in perfect good faith, and under an honest conviction that he was acting strictly within the line of his duty."

§ 369. **Separate Charges for Separate Acts.**—The levy of an attachment upon each separate piece of real estate constitutes an independent levy on property. In *Young v. Miller*, opinion filed April 2, 1883, the court held that there were three distinct levies, for each of which the sheriff was entitled to the fees allowed "for levying an attachment on property."

§ 370. **Mileage for Conveying Prisoners.**—When an officer conveys a number of prisoners before a magistrate or to prison, he is entitled, under the Statute of 1869–70, to charge for mileage for each prisoner so conveyed. In the case of *Sherman v. County of Santa Barbara*, 59 Cal, 483, the sheriff charged, and the court below held he was entitled to receive, \$31.50 for taking each of five prisoners from the same magistrate to the county jail—a distance of one hundred and five miles; that under the provisions of the Act referred to, the plaintiff was entitled to charge mileage for each service in all cases, except those specified in the proviso, viz.: those of jurors and witnesses. The court said:

“The only matter in dispute in this case is as to the construction of a clause of the Act ‘to Regulate Fees of Office,’ etc. (Statute 1869–70, 148.) The sheriff is thereby allowed to charge: ‘For every mile necessarily traveled, in going only, in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on habeas corpus, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding; *provided*, that in serving a subpoena or venire, where two or more jurors or witnesses live in the same direction, but one mileage shall be charged, thirty cents.’ The sheriff charged, and the court below held he was entitled to receive, \$31.50 for taking each of five prisoners from the same magistrate to the county jail—a distance of one hundred and five miles.”

“A proviso,” says Dwarris, “is something engrafted upon a preceding enactment, for the purpose of taking special cases out of the general enactment, and providing specially for them.” The term, from its origin, suggests the employment of *prevision*; as if the legislature had declared “look out for”—see that the general words of the enacting clause shall not have a particular effect. Hence, “on condition that;” and a proviso implies that the general clause shall have no effect, except upon condition that the proviso be also given effect. There is a technical rule of pleading which distinguishes between provisos and *exceptions* in the purview or enacting clause of an Act. But a proviso, like that contained in the statute we are considering, as broadly separates the service of subpoenas and venires from the duties mentioned in the enacting clause, as if the exceptions were inserted in the purview. It lays down a special rule as to them, for the very purpose of limiting the charge to a single

mileage, and because, except for the proviso, the sheriff, under the rule of the enacting clause, would be entitled to charge for each witness and juryman. Thus the principle of the maxim, "*expressio unius*," etc., applies. Judgment affirmed.

A sheriff or constable, under the statute of 1870 (and there has been no change or modification of the law since, up to this writing, 1884, in this respect), for executing a warrant of arrest, is entitled to mileage, both for the distance traveled in going to make the arrest, and for that traveled from the place of arrest to the magistrate. They are also entitled to mileage for distance traveled outside the county in making an arrest, and in taking the prisoner toward a magistrate. These propositions were settled in the case of *Thomas Cunningham, sheriff of San Joaquin County v. The County of San Joaquin*, 49 Cal. 323. The plaintiff was sheriff of San Joaquin county, and, after March 6th, 1872, executed several warrants for the arrest of persons charged with crime. He presented for allowance to the Board of Supervisors, an account for these services, in which he charged mileage not only for the distance traveled in going to make the arrest, but for that traveled in conveying the prisoner from the place of arrest to the magistrate who issued the warrant. The Board rejected that part of the account which was for mileage in taking prisoners from the place of arrest to the magistrate.

One Langmaid was a constable in said county, and as such, received a warrant of arrest, and to execute the same, traveled a number of miles outside of San Joaquin county, and in Tuolumne county. He traveled in Tuolumne county five miles in going to make the

arrest, and five miles in returning. The Board of Supervisors disallowed that part of Langmaid's account which was for travel outside San Joaquin county, and for travel in San Joaquin county in taking the prisoner from the place of arrest to the magistrate. He then assigned his demand to the plaintiff, who commenced this action in the District Court to recover the demands. The court below held that the sheriff was not entitled to mileage for taking a prisoner from the place of arrest to the magistrate, or to prison, and that the constable was not entitled to mileage outside the county, either in going or returning, and was not entitled to mileage for taking a prisoner from the place of arrest to prison, or to the magistrate, and rendered a judgment accordingly. On appeal, the court said:

"The 'executing a warrant of arrest' and 'the taking a prisoner before a magistrate' are mentioned in the statute as separate and distinct acts. The words 'in going only,' which immediately precede the words 'in executing any warrant of arrest,' cannot be held to apply to the taking of a prisoner before the magistrate, except as applicable to the distance traveled from the place of arrest to the magistrate, and the officer making the arrest was entitled to his mileage for that distance. The officer was entitled to his mileage (outside of San Joaquin county) in going to make an arrest and in taking a prisoner toward the magistrate. Judgment reversed. The District Court will enter a judgment in accordance with the foregoing."

§ 371. **Officer may have Execution for Fees.**
§ 38 of an Act to Regulate Fees, etc., approved March 5, 1870, provides that if any clerk, sheriff, justice of

the peace, or constable, shall not have received any fees due to him for services rendered in any suit or proceeding, he may have execution therefor, in his own name, against the party by whom they are due, to be issued from the court in which the action is pending.

CHAPTER XVII.

DUTIES OF SHERIFFS AND CONSTABLES.

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- § 430. Jurisdiction of Offenses.
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§ 372. **The Office of the Sheriff.**—The sheriff must have his office and residence at the county seat, and must keep his office open for the transaction of business from nine o'clock A. M. till five o'clock P. M. every day in the year, except holidays ; except in San Francisco, where the office of the sheriff must be kept

open from nine o'clock A. M. till four o'clock P. M. The sheriff and his deputies may administer oaths. He shall in no case absent himself from the State for a period of more than sixty days, and for no period without the consent of the Board of Supervisors. The authority of the sheriff to execute all final process in his hands after the expiration of his term, is taken from him by the Act of March 14, 1883, for the establishment of a uniform system of county and township governments, which provides that "When any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office; and when the sheriff sells real estate under and by virtue of an execution or order of court, he, or his successors in office, shall execute and deliver to the purchaser, or purchasers, all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale." He may appoint an under sheriff and as many deputies as he may deem necessary, and, under the Act of 1883, pay them whatever salary he and they may agree upon, but their services shall not be a charge against the county from the time said Act goes into operation. Strictly speaking, there can be no vacancy in the office of sheriff, caused by the death, removal or resignation of the incumbent; for upon the happening of such an event, the coroner, by operation of law, becomes sheriff. (People v. Phœins, 6 Cal. 99.) But the coroner only holds the office of sheriff *ex-officio* until the appointment of a new sheriff by the Board of Supervisors. The sheriff must summon

grand and trial jurors of his county, witnesses for criminal and civil cases, when called upon to do so, make arrests for all violations of law, convey prisoners to state prison, and insane persons to the asylum for the insane, provide food and necessary clothing and bedding for prisoners in the county jail, attend upon the grand jury when in session ; and serve all processes brought to him regular on their face. The public records and other matters in his office are at all times, during office hours, open to the inspection of any citizen of this State.

Subpœna and Witness Fees.—The subpœna in civil cases may be served by any person. The service is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel and one day's attendance. Witness fees are \$2 per day and twenty cents per mile.

§ 373. **Suppression of Riots.**—When a sheriff or other public officer authorized to execute process, finds, or has reason to apprehend that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting, their aiders and abettors. The officer must certify to the court from which the process issued the names of the persons resisting, that they may be proceeded against in due time for their contempt of court. If it appears to the governor that the civil power of any county is not suffi-

cient to enable the sheriff to execute process delivered to him, he must, upon the application of such sheriff, order such portion as shall be sufficient, or the whole, if necessary, of the organized national guard or enrolled militia of the State, to proceed to the assistance of the sheriff. When any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the State, immediately to disperse. If the persons assembled do not immediately disperse, such magistrate and officers must arrest them, and to that end may command the aid of all persons present or within the county. When there is an unlawful or riotous assembly with the intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the State, or of the United States, and the fact is made known to the governor, or to any justice of the Supreme Court, or to the superior judge or sheriff of the county, or to the mayor of a city, or to the president of the Board of Supervisors of the cities and counties of Sacramento and San Francisco, either of those officers may issue an order directed to the commanding officer of a division or brigade of the organized national guard or enrolled militia of the State, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified to aid the civil authorities in suppressing violence and enforcing the laws (§§ 723–728, Penal Code); and such armed force must obey the orders of such civil

officer in relation thereto. (§ 730, Penal Code.) If in the opinion of such civil officer, it shall become necessary that the troops shall fire or charge upon any mob or body of persons so assembled, such civil officer shall give a written order to that effect to the superior officer present in command of such troops, who will at once proceed to carry out the order, and shall direct the firing and attack to cease only when such unlawful assembly shall have been dispersed, or when ordered to do so by the proper civil authority. (§ 731, Penal Code.)

§ 374. **Liability on Unfinished Process.**—It shall be the duty of all officers to complete the business of their respective offices to the time of the expiration of their respective terms; and any officer failing to do so is liable to pay to his successor the full value of such uncompleted services:

§ 375. **When Officer may Hold Over.**—When the term of an officer expires, and the law or the Constitution authorizes him to hold over until his successor is elected and qualified, the old incumbent is authorized to discharge the duties of the office until a qualified successor presents himself, who has been elected by the body upon which the power of election is devolved; and the governor has no power to appoint a successor. (People v. Tilton, 37 Cal. 614.)

§ 376. **The Fee Book.**—The sheriff must keep a fee book, open to the public inspection during office hours, in which must be entered at once, and in detail, all fees or compensation of whatever nature, kind, or description, collected or chargeable. On the first

Monday of each and every month the officer must add up each column in his book to the first day of the month, and set down the totals ; and on the expiration of his term, he must deliver all fee books kept by him to the county auditor. The fees must be paid to the county treasurer on the first Monday of each month.

§ 377. **Prepayment of Fees.**—The sheriff is not in any case, except for the State and county, to perform any official services, unless upon the prepayment of his fees, except in cases on habeas corpus, and on such payment the officer must perform the services required. For every failure or refusal to perform official duty when the fees are tendered, the officer is liable on his official bond. Every officer, upon receiving any fees for official duty or service, may be required by the person paying the same to make out in writing and deliver to such person a particular account of such fees, specifying for what they respectively accrued, and shall receipt the same ; and if he refuse or neglect to do so when required, he shall be liable to the party paying the same in treble the amount so paid.

The statute which declares that “any officer may refuse to perform any services in a civil action or proceeding, until the fee for such service is paid,” is not to be construed as prohibiting the officer from performing the service without prepayment of fees, but as permissive merely ; leaving the alternatives of cash in advance or credit to his own election. (*Lick v. Madden*, 25 Cal. 202.)

If, when services are demanded of an officer in a civil case, he fails to demand his fees in advance, his obligation to perform the duty required is the same as

it would be if the fees were prepaid or tendered in advance. *Id.*

§ 378. **Deputy Constables.**—In the absence of statutory provisions as to the appointment of deputies by constables, the common law rule applies, and constables may act by deputy in the exercise of their ministerial functions. (*Johnson v. Fennell*, 35 Cal. 711.)

§ 379. **Officer cannot act as Attorney.**—It is not lawful for the sheriff nor any of his deputies of the city and county of San Francisco to appear or advocate, or in any manner act as attorney, counsel, or agent for any party or person in any cause, or in relation to any demand, account, or claim pending, or to be sued or prosecuted before the justices of the peace of that city and county, or any of them, or which may be within their jurisdiction; and a violation of this provision shall be deemed a misdemeanor in office.

Sheriffs and constables and their deputies are prohibited from practicing law or acting as attorneys or counselors at law, or having as a partner a lawyer or anyone who acts as such.

§ 380. **Dereliction a Misdemeanor.** — Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor. (§ 176, Penal Code.) In *Ex Parte Harrold*, 47 Cal. 129, it is declared that this provision does not apply to conditions or qualifications on which the incumbent's right to hold

an office depends, but to duties pertaining to the office, while in the discharge of official duties.

§ 381. **Gratuities Prohibited.**—Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor. (§ 70, Penal Code.)

§ 382. **Penalty for Receiving Illegal Fees.**—The Board of Supervisors, upon receiving a certified copy of the record of conviction of an officer for receiving illegal fees, must declare his office vacant.

§ 383. **Making Contracts and Buying Claims.** No sheriff or constable must be interested in any contract made by him in his official capacity ; nor may he be a purchaser at any sale, nor vendor at any purchase made by him in his official capacity. The sheriff is prohibited by law from buying or selling warrants or claims upon the treasury, except for services rendered by such officer. A sheriff's or constable's resignation must be in writing to the clerk of the Board of Supervisors.

§ 384. **Duties of Sheriffs and Constables under the Act of 1883.**—The duties of sheriffs, as prescribed in the Act to Establish a Uniform System of County and Township Governments, approved March 14, 1883, are almost identical with those contained in Article IV, Chapter 3, Title 2, of the Political Code, and those duties are also made the duties of constables by § 4315 of the same code, with the exceptions of the

fourth and sixth subdivisions of the section relating to the attendance upon courts and care of the county jail, and are as follows. He must :

1. Preserve the peace ;
2. Arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or who have committed a public offense ;
3. Prevent and suppress any affrays, breaches of the peace, riots, and insurrections which may come to his knowledge ;
4. Attend all courts, except Justices' and Police Courts, held within his county, and obey their lawful orders and directions ;
5. Command the aid of as many male inhabitants of his county as he may think necessary in the execution of these duties ;
6. Take charge of and keep the county jail and the prisoners therein ;
7. Release on the record all attachments of real property when the attachment placed in his hand has been released or discharged ;
8. Indorse upon all process and notices the year, month, day, hour, and minute of reception, and issue therefor to the person delivering it, on payment of fees, a certificate showing the names of the parties, title of paper, and time of reception ;
9. Serve all process and notices in the manner prescribed by law ;
10. Certify under his hand, upon process or notices, the manner and time of service, or, if he fails to make service, the reason of his failure, and return the same without delay.

When process or notices are returnable to another county, he may inclose such process or notice in an

envelope, addressed to the officer from whom the same emanated, and deposit it in the post-office, prepaying postage.

The return of the sheriff, upon process or notices, is *prima facie* evidence of the facts in such return stated.

If a sheriff does not return a notice or process in his possession with the necessary indorsement thereon without delay, he is liable to the party aggrieved for the sum of \$200 and for all damages sustained by him.

If the sheriff to whom a writ of execution is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon and sold, he is liable to the creditor for the value of such property.

If he neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office (after deducting all legal fees), the amount thereof, with twenty-five per cent. damages and interest at the rate of ten per cent. per month from the time of demand, may be recovered by such person.

A sheriff who suffers the escape of a person arrested in a civil action, without the consent or connivance of the party in whose behalf the arrest or imprisonment is made, is liable, as follows :

1. When the arrest is upon an order to hold to bail, or upon a surrender in exoneration of bail before judgment, he is liable to the plaintiff as bail ;

2. When the arrest is on an execution or commitment to enforce the payment of money, he is liable for the amount expressed in the execution or commitment ;

3. When the arrest is on an execution or commitment other than to enforce the payment of money, he is liable for the actual damages sustained ;

4. Upon being sued for damages for an escape or rescue, he may introduce evidence in mitigation and exculpation.

He is liable for the rescue of a person arrested in a civil action, equally as for an escape.

An action cannot be maintained against the sheriff for a rescue, or for an escape of a person arrested upon an execution or commitment, if, after his rescue or escape, and before the commencement of the action, the prisoner returns to the jail, or is retaken by the sheriff.

No direction or authority by a party or his attorney to a sheriff, in respect to the execution of process or return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing, signed by the attorney of the party, or by the party, if he has no attorney.

When the sheriff is committed, under an execution or commitment, for not paying over money received by him by virtue of his office, and remains committed for sixty days, his office is vacant.

A sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued. But if the proceedings are shown to have been defective, he will not be the less liable to an action for serving the writ issued thereon.

The officer executing process must then, and at all times subsequent, so long as he retains it, upon request,

show the same, with all papers attached, to any person interested therein.

The sheriff in attendance upon court must act as the crier thereof, call the parties and witnesses and all other persons bound to appear at the court, and make proclamation of the opening and adjournment of the court, and of any other matter under its direction.

Service of a paper, other than process upon the sheriff, may be made by delivering it to him, or to one of his deputies, or to a person in charge of the office during office hours, or if no such person be there, by leaving it in a conspicuous place in the office.

When a sheriff is a party to an action or proceeding, the process and orders therein, which it would otherwise be the duty of the sheriff to execute, must be executed by the coroner of the county; *provided*, when any action is begun against the sheriff, all process and orders may be served by any person a citizen of the United States, over the age of eighteen years, in the manner provided in the Code of Civil Procedure.

Process or orders in an action or proceeding may be executed by a person residing in the county, designated an elisor, when the sheriff and coroner are both parties, when either is a party and the process is against the other, when either is a party and there is a vacancy in the office of the other, or when both are disqualified, or by reason of prejudice would not act promptly or impartially.

§ 385. **Sheriff to Provide Court-rooms.**—§ 144 of the Code of Civil Procedure provides that if suitable rooms for holding the Superior Courts and the

chambers of the judges of said courts be not provided in any city and county, or county, by the supervisors thereof, together with the attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the county treasury.

§ 386. **Void Confiscations.**—So much of § 636 of the Penal Code as declares that all nets, etc., used in catching or taking fish in violation of Chapter 1, Title XV, of said code, shall be forfeited, and may be seized by the peace officers of the county, and by them destroyed or sold, is unconstitutional and void. (*Ieck v. Anderson*, 57 Cal. 251.) Confiscations without a judicial hearing and judgment, after due notice, are void, as not being due process of law.

§ 387. **Sheriffs to give Dead Bodies to Physicians.**—The sheriff or keeper of a county jail must surrender the dead bodies of such persons as are required to be buried at the public expense to any physician or surgeon, to be by him used for the advancement of anatomical science, preference being always given to medical schools by law established in this State, for their use to the instruction of medical students. But if such person during his last sickness requested to be buried, or if, within twenty-four hours after his death, some person claiming to be of kindred or a friend of the deceased requires the body to be buried, or if such deceased person was a stranger or traveler

who suddenly died before making himself known, such dead body must be buried without dissection. (§ 3094, Political Code.)

§ 388. **Aid to Wrecked Vessels.**—The sheriff in each county must give all possible aid and assistance to vessels stranded on its coast, and to the persons on board the same, and exert himself to save and preserve such persons, vessels, and their cargoes, and all goods and merchandise which may be cast by the sea upon the land, and to this end may employ as many persons as he may think proper. He must take possession of all wrecked property found and keep it for the owner, or until disposed of in accordance with Art. IV, Chap. 1, Title VI, Political Code.

§ 389. **Sheriff as Auctioneer.**—In any city or town where there is no auctioneer, the sheriff or a constable thereof is *ex-officio* auctioneer, and is permitted to sell any property, real or personal, at public auction; and for any delinquency as such *ex-officio* auctioneer he is liable on his official bond. (§ 3291, Political Code.)

§ 390. **Militia Exemptions from Arrest.**—No person belonging to the military forces is subject to arrest, on civil process, while going to, remaining at, or returning from any place at which he may be required to attend for military duty. (§ 2021, Political Code.)

§ 391. **Process of Court-Martial.**—Every sheriff and constable must serve all orders, subpoenas, or process delivered to him for that purpose by any member of a court-martial. (§ 2084, Political Code.)

2. When a person arrested has committed a felony, although not in his presence ;

3. When a felony has, in fact, been committed, and he has a reasonable cause for believing the person arrested to have committed it ;

4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested ;

5. At night, when there is reasonable cause to believe that he has committed a felony.

§ 400. **Officer making Arrest may Summon Aid.**—An officer, or any person making an arrest, may orally summon as many persons as he deems necessary to aid him therein. Any person refusing to assist an officer when so called upon, is punishable by fine of not less than fifty nor more than \$1000. (§ 150, Penal Code.)

§ 401. **When Warrant must be Shown.**—If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required. (§ 842, Penal Code.)

§ 402. **When Arrest may be at Night.**—If the offense charged is a felony, the arrest may be made on any day, and any time of the day or night. (§ 840, Penal Code.)

§ 403. **When Arrest cannot be Made at Night.** When the offense charged is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate indorsed upon the warrant. *Id.*

§ 404. **Night-time Defined.**—The phrase “night-time,” as used herein, means the period between sunset and sunrise. (§ 3260, Political Code.)

§ 405. **How Arrest is Made.**—The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape. (§ 841, Penal Code.)

§ 406. **When Force may be Used.**—When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest. (§ 843, Penal Code.)

§ 407. **When Doors may be Broken.**—To make the arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired. (§ 844, Penal Code.)

§ 408. **Taking Weapons from Prisoners.**—Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken. (§ 846, Penal Code.)

§ 409. **Name of Defendant in Warrant.**—The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. (§ 815, Penal Code.)

§ 410. **How Executed in another County.**—If the defendant is in another county than that in which the warrant is issued, it may be served therein upon the written direction of a magistrate of the county in which it is to be served, indorsed upon the warrant, signed by him, with his name of office, and dated at the county, city, or town where it is made, to the following effect: "This warrant may be executed in the county of —," (naming the county). Such indorsement cannot, however, be made, unless the warrant be accompanied with a certificate of the clerk of the county where it was issued, under seal, as to the official character of the magistrate; or unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. (§§ 819, 820, Penal Code.)

§ 411. **Taking Prisoner Before Magistrate.**—If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county. (§ 821, Penal Code.)

If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly. (§ 822, Penal Code.)

On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant and undertaking to the clerk of the court at which the defendant is required to appear. (§ 823, Penal Code.)

If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant, with his return thereon indorsed and signed by him. The defendant must in all cases be taken before the magistrate without unnecessary delay. (§§ 824, 825, *Id.*)

§ 412. **Proceedings Before Magistrate.**—If the defendant is brought before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew. (§ 826, Penal Code.)

§ 413. **Offense Triable in another County.**—When an information is laid before a magistrate, of the commission of a public offense, triable in another county of the State, but showing that the defendant is in the county where the information is laid, the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county

in which the offense is triable, and the depositions of the informant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered. The officer must then take the defendant and the papers to such magistrate, with his return indorsed on the warrant. If the offense in such case is a misdemeanor, the officer must, if the defendant require it, take him before the magistrate of the county in which the warrant was issued, who must admit him to bail. (§§ 827-8-9, Penal Code.)

§ 414. **Retaking after Escape.**—If a person arrested escape, or is rescued, the officer may immediately pursue and retake him at any time and any place within the State. (§ 854, Penal Code.) If the prisoner escape into another State, the officer cannot retake him except upon a requisition from the governor of the State from which he escaped. To retake an escaped prisoner, the officer pursuing may break open an outer or inner door or window, if after notice of his intention, he is refused admittance. (§ 855, *Id.*)

§ 415. **Prisoner Entitled to Counsel.**—A prisoner is entitled to receive visits from his attorney at all reasonable times.

§ 416. **Liability for Delay.**—Every public officer or other person, having arrested a person on a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor. (§ 145, Penal Code.)

§ 417. **Rescuing Prisoners.**—Every person who rescues or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison, or from any officer or person having him in lawful custody, is punishable under § 101 of the Penal Code.

§ 418. **Escapes from Jail.**—Every prisoner confined in any jail who escapes or attempts to escape therefrom, is guilty of a misdemeanor. Every person who assists in such act is also guilty of a misdemeanor. (§§ 107-9, Penal Code.)

§ 419. **Carrying Articles to Prisoners.**—Every person who carries or sends into a prison anything useful to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable by imprisonment in the state prison not exceeding ten years and fine not exceeding \$10,000. (§§ 108-10, Penal Code.)

§ 420. **Refusing to Receive Prisoners.**—§ 142 of the Penal Code provides that every sheriff, coroner, keeper of a jail, constable, or other peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding \$5000, and imprisonment in the county jail not exceeding five years.

An officer, nevertheless, should be guarded as to receiving persons as prisoners without a warrant or commitment.

§ 421. **Making Arrests, etc., Without Authority.**—Every public officer, or person pretending to be

a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses anyone of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor. (§ 146, Penal Code.)

§ 422. **Assaults by Officers.**—Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding \$5000, and imprisonment in the county jail not exceeding five years. (§ 149, Penal Code.)

§ 423. **Refusing to Aid Officers.**—Every male person above eighteen years of age who neglects or refuses to join the *posse comitatus*, or power of the county, in arresting any person, or in retaking an escape, or to prevent any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, is punishable by fine of not less than fifty nor more than \$1000. (§ 150, Penal Code.)

§ 424. **Prisoners brought from other Counties as Witnesses.**—When it is necessary to have a person imprisoned in the state prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court and executed by the sheriff of the county where it is made.

§ 425. **Food and Lodging for Juries.**—While a jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging. (§ 1136, Penal Code.)

§ 426. **Inhumanity to Prisoners.**—Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding \$2000, and by removal from office. (§ 147, Penal Code.)

§ 427. **Gambling.**—Every sheriff, district attorney, constable, or police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of the Penal Code relative to gambling; and every such officer refusing or neglecting so to do, is guilty of a misdemeanor. (§ 335, Penal Code.)

§ 428. **Injuring Jails.**—Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding \$10,000 and by imprisonment in the state prison not exceeding five years. (§ 606, Penal Code.)

§ 429. **Removal from Office.**—In addition to the penalty affixed, by express terms, to every neglect or violation of official duty on the part of public officers, State, county, city, or township, where it is not so expressly provided, they may, in the discretion of the court, be removed from office. (§ 661, Penal Code.)

§ 430. **Jurisdiction of Offenses.**—When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county. When an offense is committed in this State, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein, in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates; and when the offense is committed in this State, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates. When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county. When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county; but if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the former. The jurisdiction on violation of the law relating to prize-fights, is in any county in which any act is done toward the commission of the offense; into, out of, or through which the offender passed to commit the offense; or where the offender is arrested. (§§ 782, 783, 785, 786, 795, Penal Code.)

§ 431. **Service of Bench Warrant.**—The bench warrant, for the arrest of a person under indictment or presentment, may be served in any county, and

need not be indorsed by a magistrate of that county. When the offense is not punishable with death, the officer must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail. But if the offense is punishable with death, the officer must deliver him into custody, according to the command of the bench warrant.

For arrest after presentment, see §§ 935 and 936, Penal Code; and for arrest after judgment, §§ 1197, 1198, 1199, Penal Code.

CHAPTER XVIII.

SUBPŒNAS IN CIVIL AND CRIMINAL CASES.

In Civil Cases.

- § 432. Issued by Justice of the Peace.
- § 433. Issued with Blank.
- § 434. Subpœnas Defined.
- § 435. How Issued.
- § 436. How Served.
- § 436. Witness Fees.
- § 437. Concealed Witness.
- § 438. When Witness Compelled to Attend.
- § 439. Arrest of Witness.
- § 440. If Witness be a Prisoner.
- § 441. Witnesses Protected from Arrest.
- § 442. When Arrest of Witness is Void.
- § 443. Liability of Officer for Detention of Witness.
- § 444. Discharge of Witness from Arrest.
- § 445. Witnesses Before Board of Supervisors.

In Criminal Cases.

- § 446. Subpœna Defined and Who May Issue.
- § 447. By Whom and How Served.
- § 448. Foreign Subpœna.
- § 449. Expenses of Witnesses.

IN CIVIL CASES.

§ 432. **Issued by Justice of the Peace.**—Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county. (§ 919, C. C. P.)

§ 433. **Issued with Blank.**—The summons, execution, and every other paper made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void. (§ 920, C. C. P.)

§ 434. **Subpœna Defined.**—The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence. (§ 1985, C. C. P.)

§ 435. **How Issued.**—The subpoena is issued as follows :

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending ;
2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it is issued by the judge, justice, or any other officer before whom the attendance is required ;
3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other State in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction ;

with like power to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as said judge or justice could exercise if the subpœna directed the attendance of the witness before their courts in a matter pending therein. (§ 1986, C. C. P.)

§ 436. **How Served. — Witness Fees.** — The service of a subpœna (in civil proceedings) is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person. (§ 1987, C. C. P.) The mileage is twenty cents per mile to the place of trial, excepting for witnesses before a justice of the peace in Monterey county, in civil cases, who are entitled to \$2 per day, but no mileage. § 31 of An Act to Regulate Fees, etc., approved March 5, 1870, provides that: For attending in any civil suit or proceeding, before any court of record, referee, commissioner, or justice of the peace, for each day, \$2; for traveling to the place of trial, for each mile, twenty cents. In case of impeachment and contested elections, for traveling to the place of trial, ten cents per mile. No person shall be obliged to attend or testify in a civil action, unless his fees shall have been tendered, or he shall have not demanded the same. § 43 of the same act (see also Hittell's Codes and Statutes, vol. 2, p. 1468,) provides as follows:

The attorney-general, or any district attorney, is authorized to cause subpœnas to be issued, and compel the attendance of witnesses on behalf of the State, without paying or tendering fees in advance, to either officers or witnesses ; and any witness refusing or failing to attend, after being served with a subpœna, may be proceeded against, and shall be liable in the same manner as is provided by law in other cases where fees have been tendered or paid.

The clerk of any court before which any witness shall have attended on behalf of the State, in any civil action, shall give to such witness a certificate, under seal, of travel and attendance, which shall entitle him to receive the same from the state treasury on the controller's warrant.

§ 437. Concealed Witness.—If a witness is concealed in a building or vessel, so as to prevent the service of a subpœna upon him, any court or judge, or any officer issuing a subpœna, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpœna ; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed. (§ 1988, C. C. P.)

§ 438. When Witness Compelled to Attend.—A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides (in civil proceedings), unless the distance be less than thirty miles from his place of residence to the place of trial. (§ 1989, C. C. P.)

§ 439. **Arrest of Witness.**—Every warrant to arrest or commit a witness must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the Superior Court. (§ 1994, C. C. P.)

§ 440. **If Witness be a Prisoner.**—If the witness be a prisoner, confined in a jail or prison within this State, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows: 1. By the court itself in which the action or special proceeding is pending, unless it be a Justice's Court; 2. By a justice of the Supreme Court, or a judge of the Superior Court of the county where the action or proceeding is pending, if pending before a Justice's Court, or before a judge or other person out of court. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases, his examination, when allowed, must be taken upon deposition. (§§ 1995, 1996, 1997, C. C. P.)

§ 441. **Witnesses Protected from Arrest.**—Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, neces-

sarily remaining there and returning therefrom. (§ 2067, C. C. P.)

§ 442. When Arrest of Witness is Void.—The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpœna, for the damages sustained by him in consequence of the arrest. (§ 2068, C. C. P.)

§ 443. Liability of Officer for Detention of Witness.—An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating:

1. That he has been served with a subpœna to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpœna was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpœna.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested. (§ 2069, C. C. P.)

§ 444. Discharge of Witness from Arrest.—

The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of § 2067, C. C. P. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge. (§ 2070, C. C. P.)

§ 445. Witnesses before Board of Supervisors.—Neither the officers serving subpoenas nor the witnesses subpoenaed to testify in relation to matters of public concern before the Board of Supervisors, are entitled to have their fees prepaid, but officers must serve the subpoenas and witnesses must attend without their fees being prepaid. The Board must allow them reasonable compensation for services and attendance. (§ 4069, Political Code.)

IN CRIMINAL CASES.

§ 446. Subpœna Defined, and Who may Issue.—The process by which the attendance of a witness before a court or magistrate is required is a subpoena; it may be signed and issued by:

1. A magistrate before whom an information is laid, for witnesses in the State, either on behalf of the people or of the defendant;
2. The district attorney, for witnesses in the State, in support of the prosecution, or for such other witnesses as the Grand Jury, upon an investigation pending before them, may direct;
3. The district attorney, for witnesses in the State, in support of an indictment, to appear before the court in which it is to be tried;

4. The clerk of the court in which the indictment is to be tried ; and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the State, as the defendant may require. (§ 1326, Penal Code.)

§ 447. **By Whom and How Served.**—A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally and informing him of its contents. (§ 1328, Penal Code.)

§ 448. **Foreign Subpoena.**—No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the Supreme Court, or a Superior Court judge, upon an affidavit of the district attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material and his attendance at the examination or trial necessary, shall endorse on the subpoena an order for the attendance of the witness. (§ 1330, Penal Code.)

§ 449. **Expenses of Witnesses.**—When a person attends before a magistrate, Grand Jury or court, as a witness in a criminal case, upon a subpoena, or in pursuance of an undertaking, and it appears that he has

come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the attendance of the witness be upon a trial, by an order upon its minutes, or, in any other case, the judge, at his discretion, by a written order, may direct the county auditor to draw his warrant upon the county treasurer in favor of the witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness. (§ 1329, Penal Code.)

CHAPTER XIX.

THE COUNTY JAIL.

- § 450. By whom Kept and for what Used.
- § 451. Rooms Required in Jails.
- § 452. Prisoners to be Classified.
- § 453. Prisoners must be Confined.
- § 454. United States Prisoners.
- § 455. When Jail of Contiguous County may be Used.
- § 456. Removal in case of Fire.
- § 457. Removal in case of Pestilence.
- § 458. Service of Papers on Prisoners.
- § 459. Guard for Jail.
- § 460. Must Receive all Prisoners Committed.
- § 461. Prisoners on Civil Process.
- § 462. Prisoners Required to Labor.

§ 450. **By whom Kept and for what Used.**—The common jails in the several counties of the State are kept by the sheriffs of the counties in which they are respectively situated, and are used for the detention of all persons lawfully committed thereto. The Board of Supervisors shall fix the price at which the prisoners shall be boarded, and such expenses are a charge against the county.

§ 451. **Rooms Required in Jails.**—The Penal Code requires that each jail shall contain a sufficient number of rooms to allow all persons belonging to

either one of the following classes to be confined separately and distinctly from other persons belonging to either of the other classes: 1. Persons committed on criminal process and detained for trial; 2. Persons already convicted of crime and held under sentence; 3. Persons detained as witnesses or held under civil process, or under an order imposing punishment for contempt; 4. Males separately from females. All cells should be frequently searched, and mattresses and bedding thoroughly overhauled, for contraband articles. Saws, files, and even ropes, are easily smuggled into a jail, despite the watchfulness of its keepers. There is no criminal so hardened in crime but that he has sympathizers, who are ever ready to aid him to regain his liberty. With the more desperate classes, it is a constant study of how to escape from confinement. With such prisoners, the jailor must exercise constant vigilance or allow himself to be outwitted.

§ 452. **Prisoners to be Classified.**—Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners (except husband and wife) be kept or put in the same room.

§ 453. **Prisoners must be Confined.**—A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the county jail until he is legally discharged; and if he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape.

§ 454. **United States Prisoners.**—The sheriff must receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this State; provision being made by the United States for the support of such prisoner. And the sheriff is answerable for such prisoner's safe keeping, in the courts of the United States, according to the laws thereof.

§ 455. **When Jail of Contiguous County may be Used.**—When there is no jail in the county, or when the jail becomes unfit or unsafe for the confinement of prisoners, the Superior Court judge may designate the jail of a contiguous county for the confinement of the prisoners of his county, or of any of them.

§ 456. **Removal in case of Fire.**—When a county jail or a building contiguous to it is on fire, and there is reason to apprehend that the prisoners may be injured or endangered, the sheriff or jailor must remove them to a safe and convenient place, and there confine them as long as it may be necessary to avoid the danger.

§ 457. **Removal in case of Pestilence.**—When a pestilence or contagious disease breaks out in or near a jail, and the physician thereof certifies that it is liable to endanger the health of the prisoners, the sheriff may remove the prisoners upon an order of the Superior judge.

§ 458. **Service of Papers on Prisoners.**—A sheriff or jailor upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner, with a note thereon of the time of its service. For a neglect to do so, he is liable to the prisoner for all damages occasioned thereby.

§ 459. **Guard for Jail.**—The sheriff, when necessary, may, with the assent in writing of the Superior Court judge, or in a city, of the mayor thereof, employ a temporary guard for the protection of the county jail, or for the safe-keeping of prisoners, the expenses of which are a county charge.

§ 460. **Must Receive all Persons Committed.**—The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing, and bedding, for which he shall be allowed a reasonable compensation, to be determined by the Board of Supervisors.

§ 461. **Prisoners on Civil Process.**—Whenever a person is committed on civil process, except when the people of the State are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing, and bedding, or to detain such person any longer than these expenses are provided for. But this does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs, or orders of court.

§ 462. **Prisoners Required to Labor.**—Persons confined in the county jail under a judgment of imprisonment rendered in a criminal action or proceeding, may be required by an order of the Board of Supervisors to perform labor on the public works or ways in the county, and the Board may prescribe and enforce the rules and regulations under which such labor is to be performed.

CHAPTER XX.

SEARCH WARRANTS.

§ 463. Search Warrants and How Served.

§ 463. **Search Warrants and How Served.**— A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to forthwith search the person or place named for the property specified, and to bring it before the magistrate. It may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. He may also break open doors and windows to liberate a person who, having entered to aid him, is detained therein, or when necessary for his own liberation. The magistrate issuing the warrant must insert a direction therein that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served

at any time of the day or night. A search warrant must be executed and returned within ten days after its date ; after the expiration of this time, the warrant, unless executed, is void. The officer must give a receipt for the property taken to the person in whose possession it was found ; and file with the return an inventory of the property taken. (§§ 1523-37, Penal Code.)

CHAPTER XXI.

FUGITIVES FROM JUSTICE.

§ 464. Fugitives from Justice may be brought back on Requisition, and how Requisition is Procured.—Form of Application and Affidavit.

§ 464. **Fugitives from Justice.**—A person who flees from justice to another State may be brought back upon a requisition from the governor of this State upon the governor of the State to which the fugitive has escaped. To obtain such requisition, application must be made to the governor, accompanied with an affidavit of the person making the application, setting forth the name of the fugitive, the crime with which he is charged or has been convicted, and the present whereabouts of the fugitive, together with an exemplified copy of the indictment found or other judicial proceedings had against him in the State in which he is charged to have committed the offense. All papers thus forwarded must be in duplicate. The application for a requisition should request the appointment of some person (naming him) as a suitable person to receive and bring back the fugitive. A magistrate may issue a warrant for the apprehension of a person so charged, who flees

from justice and is found in this State. The proceedings for the arrest and commitment are, in all respects, similar to those provided for the arrest and commitment of a person charged with a public offense committed in this State, except that an exemplified copy of an indictment, or other judicial proceedings, may be received as evidence before the magistrate. A fugitive from another State may be committed by the magistrate to the proper custody in the county for a reasonable time, to enable the arrest of the fugitive under the warrant of the executive of this State on the requisition of the executive of the State in which the crime was committed, unless the defendant give bail. The accounts of the person employed in bringing back such fugitive must be audited by the State board of examiners and paid out of the State treasury. The following forms of application and affidavit may be varied so as to conform to the proceeding under which the fugitive is sought to be arrested :

APPLICATION FOR REQUISITION.

*To His Excellency, The Hon. Geo. Stoneman,
Governor of the State of California:*

The undersigned respectfully makes this his application for a requisition upon the governor of the State of —— for the person of John Doe, a fugitive from justice from this State, whose alleged crime is set out in the affidavit and warrant accompanying this application ; and requests the appointment by your Excellency of Sinister Hobbs as a suitable person to receive and bring back to this State said fugitive from justice.

George Brown.

Dated, Oakland, July 3d, 1884.

AFFIDAVIT.

**In the Justice's Court of Oakland township, county of Alameda,
State of California.**

George Brown, being duly sworn, deposes and says: That John Doe stands charged in the Justice's Court of Oakland township, county of Alameda, State of California, with having on the —— day of ——, 18——, committed the crime of ——; that a complaint is on file in said court, charging said John Doe with the commission of said crime, upon which complaint a warrant has been duly issued by the justice of said court for the arrest of said John Doe; that said John Doe is not now in this State, but has fled to the State of ——, and is now, this affiant is informed and believes, in the city of ——, in said State of ——, and is a fugitive from justice.

Subscribed and sworn to before }
me this —— day of ——, 18—. }

CHAPTER XXII.

REWARDS.

§ 465. Offer of Reward Binding.

§ 466. When Reward is not Earned.

§ 467. Actions to Recover Reward.

§ 465. **Offer of Reward Binding.**—An agreement, by one who has lost property by fire or theft, to pay a certain sum to anyone who will secure the arrest and conviction of the criminal, is not a *nude pact*, but may be enforced by a person performing the service.

In such cases, the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise ; and if anyone to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until the performance, the offer may be revoked at pleasure.

Such advertisements, upon acceptance of their terms and performance of the services, become written contracts.

Where the reward was for such information as would lead to the arrest and conviction of the criminal, there could be no claim for the money until trial and

conviction. The Statute of Limitations begins to run from that time, and the limitation would be four years, as on a written contract. (*Ryer v. Stockwell*, 14 Cal. 134.)

§ 466. **When Reward is Not Earned.**—An offer, by a party who has been robbed, of a reward for the arrest and conviction of the robbers, is not earned by one who merely communicates to the party robbed his suspicions that a certain person is guilty, with a statement that others were satisfied of his guilt, and that circumstances pointed strongly towards him, and who does not claim the reward until after the arrest and conviction of the robbers. (*Burke v. Wells, Fargo & Co.*, 50 Cal. 218.)

§ 467. **Action to Recover Reward.**—In an action to recover a reward offered by the defendants for the arrest and conviction of any party guilty of a specified crime (case of *Hewitt v. Anderson*, 56 Cal. 476), the findings of the court were in favor of the plaintiff, with the exception of the finding that none of the acts of the plaintiff were done with a view of obtaining said reward, or any part of it; it was held that he was not entitled to recover. To entitle him to the reward, he must show that he knew the reward was offered, and that he acted in reference to it, and in faith of getting it.

CHAPTER XXIII.

SHERIFFS' AND CONSTABLES' FORMS.

No. 1.

Return on Summons Served on Minors.

Sheriff's Office, _____, } ss.
County of _____,

I hereby certify that I received the within summons on the _____ day of _____, 18—, and personally served the same on the _____ day of _____, 18—, on Ellen Brown, and also on Ellen Brown as administratrix of the estate of James Brown, deceased, and also on Ellen Brown as the mother of Nellie B. Brown, a minor under the age of fourteen years, and also on Kate T. Brown, defendants named in said summons, by delivering to and leaving with said Ellen Brown, personally, and in her own right, in said _____ county, a copy of said summons, with a copy of the complaint in the action named therein, and by delivering to and leaving with said Ellen Brown as administratrix of the estate of James Brown, deceased, personally, in said county, a copy of said summons, and by delivering to and leaving with said Ellen Brown, personally, as the mother of defendant Nellie B. Brown, a minor under the age of fourteen years, in said county, a copy of said summons, and by, at the same time, delivering to and leaving with said Nellie B. Brown, a minor, as aforesaid, personally, a copy of said summons, and by delivering to and leaving with the defendant, Kate T. Brown, personally, in said county, a copy of said summons.

Dated at _____, the _____ day of _____, 18—.

_____, Sheriff.

By _____, Deputy Sheriff.

Sheriff's fees, \$_____.

NOTE.—Although the language of the statute does not in express terms declare that the copy of summons delivered to a defendant must be left with him, yet it is obvious that the spirit of the law would be violated if the copy were immediately taken from a defendant and used for service upon another person; and it is therefore deemed best that the return of service should show that, not only the letter of the law, but its intent, has been complied with.

No. 2.

Return of Service of Summons on One Defendant.

Sheriff's Office, _____, } ss.
County of _____,

I hereby certify that I received the within summons on the _____ day of _____, 18—, and personally served the same upon John Doe, the within named defendant, by delivering to and leaving with said defendant, personally, in the county of _____, on the _____ day of _____, 18—, a copy of said summons, attached to a copy of the complaint referred to in said summons.

Dated at _____, this _____ day of _____, 18—.

_____, Sheriff.

By _____, Deputy Sheriff.

Sheriff's fees, \$_____.

No. 3.

Return of Service of Summons on Several Defendants.

Sheriff's Office, _____, } ss.
County of _____,

I hereby certify that I received the within summons on the _____ day of _____ 18—, and personally served the same upon the hereinafter named defendants by delivering to and leaving with each of said defendants, personally, in the county of _____, at the time set opposite their names, a copy of said summons; and

that the copy so delivered to and left with —, one of said defendants, was attached to a copy of the complaint referred to in said summons.

Names of defendants served, — — — —.

Time of Service, —.

Dated at —, this — day of — 18—.

—, Sheriff.

By —, Deputy Sheriff.

Sheriff's fees, \$—.

No. 4.

Return of Service of Summons on a Defendant and not Served as to Others.

Sheriff's Office, —, } ss.
County of —,

I hereby certify that I received the within summons on the — day of —, 18—, and personally served the same upon John Doe, one of the within named defendants, by delivering to and leaving with said John Doe, personally, in the county of —, on the — day of —, 18—, attached to a copy of the complaint referred to in said summons.

And I further certify that, after due search and diligent inquiry, I have been unable to find the within named Sally Maguzelum in — county.

Dated at —, this — day of —, 18—.

—, Sheriff.

By —, Deputy Sheriff.

Sheriff's fees, \$—.

No. 5.

Return on Summons Served on a Local Corporation.

Sheriff's Office, —, } ss.
County of —,

I hereby certify that I received the within summons on the — day of —, 18—, and personally served the same upon the Mud Springs Clay Bank, a corporation, by delivering to and leaving with Simon Sudds, the president of said The Mud Springs Clay Bank, a corporation, in the county of —, on the — day of —, 18—, a copy of said summons; and that the

copy so delivered to and left with said Simon Sudds, as president of —, said defendant, was attached to a copy of the complaint referred to in said summons.

Dated at —, this — day of —, 18—.

—, Sheriff.

By —, Deputy Sheriff.

Sheriff's fees, \$—.

NOTE.—§ 411 of the Code of Civil Procedure provides that the summons, in a suit against a corporation formed under the laws of this State, must be delivered to the president or other head of the corporation, secretary, cashier, or managing agent thereof. The teller of a bank is not the managing agent. If the suit is against a foreign corporation, or a non-resident joint stock company or association, the summons must be delivered to the managing or business agent, cashier, or secretary.

No. 6.

Return on Summons Served on Defendant of Unsound Mind.

Sheriff's Office, —, } ss.
County of —,

I hereby certify that I received the within summons on the — day of —, 18—, and personally served the same upon John Doe, the within named defendant, by delivering to and leaving with said John Doe, personally, in the county of —, on the — day of —, 18—, a copy of said summons, and by delivering to and leaving with Richard Roe, guardian of said John Doe, personally, in the county of —, on the — day of —, 18—, a copy of said summons; and that the copy so delivered to and left with said John Doe was attached to a copy of the complaint referred to in said summons.

Dated, —, the — day of —, 18—.

—, Sheriff.

By —, Deputy Sheriff.

Sheriff's fees, \$—.

No. 7.

Return on Justice's Court Summons.

I hereby certify that I received the within summons on the — day of —, 18—, and personally served the same by delivering to and leaving with —, the defendant named herein, personally, a true copy of this summons, attached to a true copy of the complaint herein, —, in — township, — county, —, this — day of —, 18—.

Fees, \$—.

_____,
Constable of — township, — county, —.

_____,
Deputy Constable.

No. 8.

Return on Justice's Court Summons when County Clerk's Certificate is Attached.

Sheriff's Office, }
County of —, } ss.

I hereby certify that I received the within summons and certificate of the county clerk of the county of —, on the — day of —, 18—, that at the said county of —, I personally served said summons on —, the within named defendant, by delivering to and leaving with him, personally, a copy of said summons and clerk's certificate attached thereto, and a copy of the complaint referred to in said summons.

Dated —, 18—.

_____,
Sheriff of the county of —.

By —, Deputy Sheriff.

Sheriff's fees, \$—.

No. 9.

Return on Summons where Defendant could not be found.

Sheriff's Office, }
County of —, } ss.

I hereby certify that I received the within summons on the — day of —, 18—, and that after due search and diligent inquiry

I have been unable to find the within named defendant, Peter Jones, in — county.

Dated at — this — day of —, 18—.

—, Sheriff.

By —, Deputy Sheriff.

Sheriff's fees, \$—.

No. 10.

Return by Affidavit of Person other than Officer of Service of Summons.

In the Superior Court, county of —, State of —.

James Boggs

v.

Richard Roggs.

} Affidavit of Service of Summons.

Roothog R. Dye, being duly sworn, deposes and says: That he is, and at all times mentioned herein was, over the age of eighteen years, and not a party to the within action; that he received the within annexed summons on the — day of —, 18—, and personally served the same upon Richard Roggs, the within named defendant, on the — day of —, 18—, by delivering to and leaving with said Richard Roggs, said defendant, personally, in the county of —, a copy of said summons, attached to a copy of the complaint referred to in said summons.

Subscribed and sworn to }
before me, this — day } Roothog R. Dye.
of —, 18—.

J. Bangs,
Notary Public.

No. 11.

Return on Order of Arrest on Summons in Arrest and Bail in Justice's Court.

I hereby certify that I have served the above order, by arresting and bringing into court the said —, this — day of —, A. D. 18—, at — o'clock — M., and that I have notified the plaintiff thereof.

Constable of — township, county of —.

By —, Deputy.

No. 12.

Return on Subpoena in Civil Cases.

Sheriff's Office, }
County of ——. } ss.

I hereby certify that I served the within subpoena, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of the said persons, personally, on the — day of —, A. D. 18—, at the — county of —, to wit: —, who did not demand fees, and —, who demanded and received — fees, \$—.

Dated, —18—.

Fees, \$—

—, Sheriff.

Service, \$—

Mileage, \$—

By—

Total, \$—

Deputy Sheriff.

No. 13.

Return of Person other than Sheriff, on Subpoena in Civil Cases.

State of —, }
County of —, } ss.

—, of said county, being duly sworn, says: That he served the within subpoena, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of the said persons, personally, on the — day of —, A. D. 18—, at the said county of —, to-wit: —, who did not demand — fees, and —, who demanded and received — fees, \$—.

Subscribed and sworn to before me, }
this — day of —, A. D. 18—. }

—, —.

No. 14.

Return on Subpoena in Criminal Case.

State of —, }
County of —, } ss.

I hereby certify that I served the within subpoena, on the — day of —, 18—, on John Doe, Richard Roe, and Jane Jenks,

being the witnesses named in said subpoena, at the county of —, by showing the original to said witnesses, personally, and informing them of the contents thereof.

Dated, —, 18—.

_____,
Sheriff of the county of —.

By —, Deputy Sheriff.

No. 15.

Return on Attachment where Defendant gives Undertaking.

Sheriff's Office, }
County of —.

I hereby certify that I received the within writ of attachment on the — day of —, A. D. 18—, and the defendant having given me a bond, as required in said writ, in an amount sufficient to satisfy the demand, besides costs, I herewith return this writ of attachment without further service.

_____, Sheriff.

By —, Deputy Sheriff.

Dated, —, A. D. 18—.

No. 16.

Return on Attachment of Personal Property.

Sheriff's Office, }
County of —.

I, —, sheriff of the county of —, do hereby certify that under and by virtue of the within and hereunto annexed writ of attachment, by me received on the — day of —, 18—, I did, on the — day of — 18—, attach the following described personal property in the possession of —, viz. : — (description of property), and attached the same by taking into my custody and putting a keeper in charge.

_____, Sheriff.

By —, Deputy Sheriff.

Dated, —, 18—.

No. 17.

*Return on Attachment of Real Property Standing on the
Records in the Name of a Person other than a
Defendant.*

State of —, }
County of —. } ss.

I, —, sheriff of the county of —, hereby certify and return that I received the hereunto annexed writ of attachment on the — day of —, A. D. 18—, and, by virtue of the same, did, on the — day of —, A. D. 18—, attach all the right, title, claim and interest of —, defendant—, (or either of them) of, in and to the following described real estate, situated in said county of —, and State of —, to wit : — (description of the property). Said real estate standing on the records of said county in the name of John Doe, was attached as follows : By filing with the recorder of said county of —, on the — day of —, A. D. 18—, a copy of the writ, together with a description of the property attached, and a notice that all the right, title and interest of —, said defendant, standing on the records of — county in the name of John Doe is attached ; and by leaving a similar copy of the writ, description and notice with an occupant of the property (or as the case may be), posting a similar copy of the writ, description and notice in a conspicuous place on the property attached, there being no occupant ; and by delivering to and leaving with said John Doe a similar copy of the writ, description and notice.

Dated, —, this — day of — A. D. 18—.

Sheriff of the county of —.

By —, Deputy Sheriff.

Fees, \$—.

NOTE.—When the property attached stands on the records in the name of a person other than a defendant, a copy of the writ, description and notice must be

left with such other person or his agent, if known and within the county, or at the residence of either, if within the county. If such other person or his agent, nor the residence of either, cannot be found, the return should state the fact that, "After due search and diligent inquiry, I have been unable to find said John Doe, nor any agent of his, nor any residence of either in — county."

No. 18.

Return on Attachment of Real Estate Standing on the Records in Name of a Defendant, and where the Property has an Occupant.

State of —, }
County of —, } ss.

I, —, sheriff of the county of —, hereby certify and return that I received the hereunto annexed writ of attachment on the — day of —, A. D. 18—, and, by virtue of the same, did on the — of —, A. D. 18—, attach all the right, title, claim, and interest of —, defendant (or either of them), of, in and to the following described real estate, situated in said county of —, and State of —, to-wit: — (description of the property). Said real estate standing on the records of said county in the name of —, was attached as follows: By filing with the recorder of said county of —, on the — day of —, A. D. 18—, a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property.

Dated, —, this — day of —, A. D. 18—.

_____,
Sheriff of the county of —.

By —, Deputy Sheriff.

Fees, \$—.

No. 19.

Return on Attachment of Real Property Standing on the Records in Name of a Defendant, and where the Property is not Occupied.

State of —, }
County of —, } ss.

I, —, sheriff of the county of —, hereby certify and return that I received the hereunto annexed writ of attachment on the — day of —, A. D. 18—, and, by virtue of the same, did on the — day of —, A. D. 18—, attach all the right, title, claim, and interest of —, defendant (or either of them), of, in and to the following described real estate, situated in said county of —, and State of —, to-wit: (description of the property.) Said real estate standing on the records of said county in the name of —, was attached as follows: By filing with the recorder of said county of —, on the — day of —, A. D. 18—, a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by posting a similar copy of the writ, description, and notice, in a conspicuous place on the property attached, there being no occupant.

Dated, —, this — day of —, A. D. 18—.

_____,
Sheriff of the county of —.

By —, Deputy Sheriff.

Fees, \$—.

No. 20.

Return on Garnishment on Bank.

Sheriff's Office, }
County of —. }

By virtue of the annexed writ of attachment, by me received on the — day of —, 18—, I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of The First National Bank of

Tar Flat, by delivering to and leaving with Oliver Twist, president of said The First National Bank of Tar Flat, personally, in the county of —, on the — day of —, A. D. 18—, a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but the sheriff of — county, or some one legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which I received the following answer: — (answer.)

Dated, —, this — day of —, A. D. 18—.

—, Sheriff.

By —, Deputy Sheriff.

No. 21.

Return on Garnishment on Individual who made no Statement.

Sheriff's Office, }
County of —. }

By virtue of the annexed writ of attachment, by me received on the — day of —, 18—, I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of Jacob Jones, by delivering to and leaving with said Jacob Jones, personally, in the county of —, on the — day of —, 18—, a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but the sheriff of — county, or some one legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which said Jacob Jones has failed, neglected and refused to answer.

Dated, —, this — day of —, A. D. 18—.

—, Sheriff.

By —, Deputy Sheriff.

No. 22.

Return on Garnishment on Individual with Statement of Garnishee.

Sheriff's Office,
County of —, }

By virtue of the annexed writ of attachment, by me received on the — day of —, 18—, I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of John Jenks, by delivering to and leaving with said John Jenks, personally, in the county —, on the — day of —, A. D. 18—, a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to anyone but the sheriff of — county, or some one legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which I received the following answer :

_____ }
v. _____ }

To notice of garnishment and demand for a statement served on me, this — day of —, A. D. 18—, by the sheriff of — county, under and by virtue of an — issued in the above entitled cause, my answer is, that I am — indebted to —, said defendant, in the sum of — dollars, and that I have in my possession and under my control — personal property belonging to said defendant, to-wit: — (description).

(Signed), _____.

Dated, — this — day of —, A. D. 18—.

_____, Sheriff.

By _____, Deputy Sheriff.

No. 23.

Return on Execution where Personal Property has been Levied on and Sold.

State of —, }
County of —, } ss.

No. —.

Sheriff's Return on Execution.

I, —, sheriff of the county of —, do hereby certify that under and by virtue of the within and hereunto annexed writ of

execution, — by me received on the — day of —, A. D. 18—, I did, on the — day of —, A. D. 18—, levy upon the personal property hereinafter described, and noticed the same for sale as the law directs (by posting written notice of the time and place of sale), particularly describing the property, for — days successively, in three public places of the township or city where said property was sold, and on —, the — day of —, A. D. 18—, at — o'clock, — M. of said day, — (place of sale), in said county, the time and place fixed for said sale, I did attend and offered for sale at public auction, for United States gold coin, the property described: — (description). And sold the whole of the same in — separate parcels to various purchasers for the sum of — dollars, in United States gold coin; said purchasers being the highest bidders, and said sum being the highest bid, in the aggregate, for the same; and I have given such purchaser, —, a certificate of said sale. (Here state satisfaction of the judgment, or otherwise, as indicated in form of return on levy and sale of real estate.)

And I further certify that I deducted from the said sum of \$—
My fees, commission and expenses, amounting to the sum of \$—

Leaving a net balance of - - - - \$—

Which I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

Dated, —, this — day of —, A. D. 18—.

Sheriff of the county of —.

By —, Deputy Sheriff.

No. 24.

Return on Execution where Real Estate has been Levied on and Sold.

State of —, }
County of —. } ss.

No. —.
Sheriff's Return on Execution.

I, —, sheriff of the county of —, do hereby certify that under and by virtue of the within and hereunto annexed writ of execution, by me received on the — day of —, A. D. 18—, I did, on the — day of —, A. D. 18—, levy upon the lands hereinafter described, and noticed the same for sale as the law directs (by posting written notice of the time and place of sale,

particularly describing the property, for twenty days successively in three public places of the township or city where said property is situated, and also where said property was to be sold, and publishing a copy thereof once a week for the same period in the —, a newspaper published in said county of —), and on —, the — day of —, A. D. 18—, at — o'clock — M. of said day, in front of the court house door of said county, the time and place fixed for said sale, I did attend and offered for sale at public auction, for United States gold coin, the property described: — (description.) And sold the whole of the same to —, for the sum of — dollars, in United States gold coin; said — being the highest bidder, and said sum being the highest bid for the same; and I have given said purchaser, —, a certificate of said sale, and have filed a duplicate thereof for record with the recorder of said county of —; and I herewith return said writ fully satisfied. (If the proceeds of sale do not satisfy the judgment, omit the last clause to that effect, and state that, after due search and diligent inquiry, I have been unable to find any other property belonging to the within named defendants, or either of them, not exempt from execution, in — county, out of which to make the remainder of said judgment, or any part of such remainder, and herewith return said writ partly satisfied, to wit: in the sum of \$—.)

And I further certify that I deducted from the said sum of \$—
My fees, commission and expenses, amounting to the sum of \$—

Leaving a net balance of - - - - \$—

Which I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

Dated, —, this — day of —, A. D. 18—.

Sheriff of the county of —.

By —, Deputy Sheriff.

No. 25.

Return on Foreclosure.

Sheriff's Office,	}	No. —.
of the county of —.		Sheriff's Return on Foreclosure.

I, —, sheriff of the county of —, do hereby certify: That by virtue and in pursuance of the annexed order of sale and

decree of foreclosure and sale, I advertised the property described as follows, to wit : ——(description), to be sold by me in front of the court house door in the city of ——, county of ——, on the —— day of ——, A. D. 18—, at —— o'clock ——M.; that previous to said sale I posted written notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property was to be sold ; and also caused due and legal written notice thereof to be published once a week for the same period, preceding said sale, in the ——, a —— newspaper published in the county of ——, and that on ——, the —— day of ——, 18—, the day on which said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, and exposed the said premises for sale in —— parcel— at public auction, according to law, to the highest bidder for cash —— when ——, being the highest bidder therefor, the said premises were struck off by me to the said ——, for the sum of —— dollars, in United States gold coin, which was the whole price bid, and which I acknowledge to have received ; and that I delivered to said purchaser a certificate of said sale, and filed a duplicate thereof in the office of the county recorder of the said —— county.

And I further certify that I deducted from the said sum of \$——
My fees, commission and expenses, amounting to the sum of \$——

Leaving a net balance of - - - - - \$——

Which net balance I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

(Here state the satisfaction of judgment or amount of deficiency, as the case may be.)

Dated at ——, this —— day of ——, 18—.

_____,
Sheriff of the county of ——.
By _____, Deputy Sheriff.

No. 26.

Return on Replevin when Property is Delivered to Plaintiff.

State of ——, } ss. Sheriff's Return on Replevin.
County of ——, }

I hereby certify and return, that on the —— day of ——, 18—,

I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession of the same (or all thereof to be found in my county), to-wit: — (description of property taken), and at the same time I delivered to the defendant, Jonathan Wild, a copy of the within affidavit and order, and undertaking duly approved by me, and defendant having failed to except to the surety therein, and also having omitted to require a return of said property, and no other person than the defendant having made claim thereto, I did at the expiration of the time prescribed by the statute for seeking such delivery and making such claim, to-wit: on the — day of —, 18—, deliver the property so taken to the plaintiff, as by said order I am commanded.

Fees, \$—.

Dated, —, —, 18—.

_____,
Sheriff of — county.

No. 27.

Return on Replevin when Property is Re-delivered to Defendant.

State of —, }
County of —, } ss. Sheriff's Return on Replevin.

I hereby certify and return, that on the — day of —, 18—, I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession of the same (or all thereof to be found in my county), to-wit: — (description of property taken), and at the same time I delivered to the defendant, Jonathan Wild, a copy of the within affidavit and order and undertaking, duly approved by me, and the defendant not having excepted to such surety claimed the re-delivery of the said property by giving me an undertaking in due form, and the sureties therein having justified, and no other person having made claim to said property in due form of law, I re-delivered the said property to the defendant.

Fees, \$—.

Dated, —, —, 18—.

_____,
Sheriff of — county.

No. 28.

Return on Writ of Restitution.

Sheriff's Office, _____ } ss.
County of ____.

I, —— sheriff of the county of ——, do hereby certify that under and by virtue of the within writ of restitution, by me received on the —— day of ——, 18—, I served the same on the —— day of ——, 18—, by placing the within named —— in quiet and peaceable possession of the lands and premises therein described. I further certify that after due search and diligent inquiry I have been unable to find any property belonging to the within named defendant, in —— county, not exempt from execution, out of which to make the within money judgment, or any part thereof, and I herewith return said writ without further service, fully satisfied as to the plaintiff's possession of the lands and premises therein described, and wholly unsatisfied as to said money judgment.

Sheriff of the county of ——.

By ——, Deputy Sheriff.

Dated, ——, this —— day of ——, 18—.

NOTE.—If any money is made by levy and sale, or otherwise, the return as to the money judgment will be the same as in return on writs of execution. If the officer put the plaintiff's agent in possession, the return should show that the writ was served "by placing the within named plaintiff, by his agent, John Roe, in quiet and peaceable possession," etc.

No. 29.

Return on Writ of Restitution not Served by reason of Strangers in Possession.

Sheriff's Office, _____ } ss.
County of ____.

I, ——, sheriff of the county of ——, hereby certify and return that I received the within hereunto annexed writ of restitution on the —— day of ——, 18—, and that on the —— day of ——,

18—, I proceeded to the premises therein described for the purpose of serving said writ, and that neither H. F. Larabee, the within named defendant, nor any agent of said Larabee, was then or has been since, in the possession of said premises ; and that said premises were in the possession of and occupied by L. H. Brown, who then and there claimed possession thereof as heir of George Brown, deceased, owner in fee simple of said premises, and also claimed possession of said premises as executor of the last will of George Brown, deceased, owner in fee simple of said premises ; and said L. H. Brown, as such executor, claimed possession and title to the said premises by title superior to and entirely independent of any claim or title or possession of plaintiff or defendant named in said writ. I further certify that, after due search and diligent inquiry, I have been unable to find any property belonging to the within named defendant, in Alameda county, not exempt from execution, out of which to make the money judgment in said writ, or any part thereof, and I herewith return said writ without further service, wholly unsatisfied.

_____,
Sheriff of the county of —.

Dated, —, 18—.

No. 30.

Return on Writ of Assistance.

The same form of return may be used as in writ of restitution. There is no money judgment in the writ of assistance, and no return required except as to putting plaintiff in possession.

No. 31.

Return on Writ of Certiorari.

Sheriff's Office, }
County of —, }

I hereby certify that I received the within writ on the — day of —, 18—, and served the same on the — day of —, 18—, by delivering to and leaving with Hezekiah Lorgs, personally, in — county, a copy of the within writ.

_____,
Sheriff of the county of —,
By —, Deputy Sheriff.

Dated, —, 18—.

No. 32.

Return on Citation.

I, —, sheriff of the county of —, do hereby certify that I served the within citation on the within named —, by delivering to —, personally, a copy thereof, on the — day of —, A. D. 18—, at said county.

Dated, —, 18—.

Fees, \$—.

—, Sheriff.
By —, Deputy Sheriff.

No. 33.

Search Warrant.

County of —.

The People of the State of — to any sheriff, constable, marshal, or policeman in the county of —:

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application, according to § 1525 of the Penal Code, or, if the affidavit be not positive, that there is probable cause for believing that—stating the ground of the application in the same manner), you are therefore commanded, in the daytime (or at any time of the day or night, as the case may be, according to § 1533 of the Penal Code), to make immediate search on the person of C. D. (or in the house situated —, describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property: (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place).

Given under my hand, and dated this — day of — A. D. 18—.

E. F., Justice of the Peace (or as the case may be).

No. 34.

Inventory with Search Warrant.

I, —, the officer by whom the warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

No. 35.

Return on Search Warrant.

County of —.

I hereby certify that I have served the within warrant, and have the property described therein in the place designated, in the possession of —, and having cause to believe that said — stole said property, I have arrested him, and have him with the goods here in court.

No. 36.

Return on Warrant of Arrest.

I hereby certify that I received the within warrant on the — day of —, 18—, and served the same by arresting the within named defendant on the — day of —, 18—, and bringing him into court this — day of —, 18—.

No. 37.

Return on Service of Injunction on Individual.

Sheriff's Office, }
County of —. } ss.

I hereby certify that I received the annexed order of injunction on the — day of —, 18—, and personally served the same on the — day of —, 18—, upon Silas Snooks, defendant, by delivering to said Silas Snooks, personally, in the county of Alameda, a copy of said order of injunction and of the summons, and a copy of the verified complaint in said action therein named, at the same time showing him the annexed original order of injunction and informing him of the contents thereof.

Dated, —, 18—.

Sheriff of the county of —.

By —, Deputy Sheriff.

Sheriff's fees, \$—.

No. 38.

Return on Service of Injunction on Board of Supervisors.

Sheriff's Office,
County of ——. } ss.

I hereby certify that I received the annexed writ of injunction on the — day of —, 18—, and duly served the same on said — day of —, 18—, by personally delivering to and leaving with the following named persons, as members of the Board of Supervisors of the county of —, in the said county of —, on said day, a copy of said writ of injunction attached to a copy of the complaint mentioned in said writ of injunction, which said copy of the complaint had attached to it the verification to the original complaint, and at the same time showing to each of said persons the writ of injunction annexed hereto, and stating the contents thereof to each of said persons: — (names of persons served.)

And I further certify that, at the time of said service, said persons were members of the Board of Supervisors of the county of —, the defendant named in said writ of injunction and complaint, and that said persons were so served as members of said board.

And I further certify that I served the said writ of injunction on the defendant, "The county of —," on the — day of —, 18—, by personally delivering to and leaving with John F. Smith, the president of the Board of Supervisors of said county of —, a copy of said writ of injunction attached to a copy of the complaint mentioned in said writ of injunction, which said copy of the complaint had attached to it a copy of the verification to the original complaint, and at the same time showing to said Smith, as president of said board, the writ of injunction annexed hereto, and stating the contents thereof to him.

Sheriff of the county of —.

By —, Deputy Sheriff.

Dated, —, 18—.

No. 39.

Return on Venire for Jurors.

State of —, }
County of —, }

I hereby certify that I received the within and hereunto annexed venire for — jurors, on the — day of —, A. D. 18—, and by virtue of the same have personally summoned the hereinafter named persons to be and appear at the time and place therein named, to act as — jurors. I also certify that they were summoned at the time and in the manner set opposite their respective names, viz.: by leaving with them personally, when they could be found, the notice required by statute, and when they could not be found, by leaving such notice at their respective places of residence with some person of suitable age.

Names.	Manner of Service.	Time of Service.	No. Miles.
--------	--------------------	------------------	------------

Dated, —, this — day of —, 18—.

_____,
Sheriff of the county of —,
By _____, Deputy Sheriff.

No. 40.

Order for Levy and Sale of Personal Property.

State of —, }
County of —, }

In the — Court, in and for — county.

_____	} Order for Levy and Sale of Personal Property.
v. _____	

To —, sheriff of — county :

You are hereby instructed to levy upon and sell, by virtue of the accompanying writ, in the above entitled suit, the following described personal property, belonging to the defendant herein :
— (description.)

_____,
Attorney for Plaintiff.

Dated, —, 18—.

No. 41.

Order for Levy and Sale of Real Estate.

State of —, }
County of —. }

In the — Court, in and for — county.

v. } Order for Levy and Sale of Real Estate.

To —, sheriff of — county :

You are hereby instructed to levy upon and sell, by virtue of the accompanying writ, in the above entitled suit, the following described property, standing on the records of — county in the name of —, (description.)

_____,
Attorney for plaintiff.

Dated, — 18—.

No. 42.

Notice of Levy on Real Estate under Execution.

[TO ATTACH TO COPY OF WRIT.]

State of — }
County of —. } ss.

Notice is hereby given that, under and by virtue of a writ of execution, issued out of the Superior Court of the — State of —, of which the annexed writ is a true copy, I have this day attached and levied upon all the right, title, claim and interest of —, defendant—, or either of them, of, in and to the following described real estate, standing on the records of — county in the name of —, and particularly described as follows : — (description of property.)

_____,
Sheriff of the county of —.
By —, Deputy Sheriff.

Dated, —, 18—.

No. 43.

Notice of Attachment of Real Property.

[TO ATTACH TO COPY OF WRIT.]

State of —, }
County of —. } ss.

Notice is hereby given that, under and by virtue of a writ of attachment, issued out of the Superior Court of the —, State of —, of which the annexed writ is a true copy, I have this day attached all the right, title, claim and interest of —, defendant—, or either of them, of, in and to the following described real estate, standing on the records of — county in the name of —, and particularly described as follows : — (description of property).

_____,
Sheriff of the county of —.
By _____, Deputy Sheriff.

Dated, —, 18—.

No. 44.

Order for Attachment of Personal Property.

State of —, }
County of —, }

In the — Court, in and for — county.

v. } Order for Attachment of Personal Property.

To —, sheriff of — county :

You are hereby instructed to attach, by virtue of the accompanying writ, in the above entitled suit, the following described property, and place a keeper in charge at plaintiff's expense, viz.: — (description).

_____,
Attorney for Plaintiff.

Dated, —, 18—.

No. 45.

Order for Attachment of Real Estate.

State of —, }
County of —, }

In the — Court, in and for — county.

v. } Order for Attachment of Real Estate.

To —, sheriff of — county :

You are hereby instructed to attach, by virtue of the accompanying writ, in the above entitled suit, the following described property, standing on the records of — county in the name of — (description).

_____,
Attorney for Plaintiff.

Dated, —, 18—.

No. 46.

Order for Release of Attachment.

v. }

To —, sheriff of — county :

Sir: You are hereby directed and ordered to release all the property attached by you in the above entitled action, and return the writ of attachment to the court from which it was issued.

—, 18—.

_____,
Plaintiff's Attorney.

No. 47.

Notice of Attachment of Stocks.

Sheriff's Office, }
County of —. }

—, 18—.

To The Happy Clam Mining Company,
and Julius Jenkins, secretary of said company:

You will please take notice that all stocks or shares, or interest in stocks or shares, of The Happy Clam Mining Company, in your possession or under your control, belonging to the within

defendant, are attached by virtue of a writ, of which this is a copy, and you are notified not to transfer or deliver over the same to anyone but the sheriff of — county. I also require of you a statement in writing of the amount of the same.

Sheriff of the county of ____.
By _____, Deputy Sheriff.

No. 48.

General Notice of Attachment of Personal Property.

Sheriff's Office, _____ }
County of _____, _____, 18—. }

To Mr. _____

You will please take notice that all moneys, goods, credits, effects, debts due or owing, or any personal property in your possession or under your control, belonging to the within defendant—, or either of them, are attached by virtue of a writ of which this is a copy, and you are notified not to pay over or transfer the same to anyone but the sheriff of — county, or some one legally authorized to receive the same, but conduct yourself in accordance with the statutes made and provided. I also require of you a statement in writing of the amount of the same.

_____, Sheriff.
By _____, Deputy Sheriff.

No. 49.

Answer to Garnishment.

In the — Court of the county of —, State of —.

_____ _____ Plaintiff v. _____ _____ Defendant	}	Answer to Garnishment.
--	---	------------------------

To notice of garnishment and demand for a statement served on me this — day of —, A. D. 18—, by the sheriff of — county, under and by virtue of an — issued in the above entitled cause, my answer is, that I am — indebted to —,

said defendant—, in the sum of — dollars, and that I have in my possession and under my control — personal property belonging to said defendant, to wit : — (property).

Signed, —.

Dated, —, 18—.

No. 50.

Undertaking to Prevent Attachment.

In the Superior Court of the — county of — of the State of —.

—, Plaintiff, }
v.
—, Defendant, }

Whereas, the above named plaintiff has commenced an action in the aforesaid court, against the above named defendant, for the recovery of — dollars, —; and whereas, an attachment has been issued, directed to —, sheriff of the county of —, and placed in his hands for execution, whereby he is commanded to attach and safely keep all the property of the said defendant within his county not exempt from execution, or so much thereof as might be sufficient to satisfy the plaintiff's demand therein stated, in conformity to the complaint, in the sum of — dollars, —, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy said demand, beside costs, in which case to take such undertaking.

And whereas, the said defendant is desirous of giving the undertaking mentioned in the said writ :

Now, therefore, we, the undersigned, residents of the —, in consideration of the premises and to prevent the levy of said attachment, do hereby jointly and severally undertake, in the sum of — dollars, —, and promise to the effect that if the plaintiff shall recover judgment in said action, we will pay to the plaintiff upon demand the amount of said judgment, together with the costs, not exceeding in all the said sum of — dollars.

Dated at —, the — day of — 18—.

—, [Seal.]
—, [Seal.]
—, [Seal.]

State of —, }
County of —, } ss.

— and —, whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself deposes and says: That he is a resident and — holder of the —, county of —, and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me, }
this — day of —, A. D. 18—. }

_____.

No. 51.

Undertaking on Release of Attachment.

In the Superior Court of the — county —, of the State of _____.

Plaintiff
v.

Defendant }

Whereas, the above named plaintiff— commenced an action in the Superior Court of the — county of —, of the State of —, against the above named defendant—, claiming that there was due to said plaintiff— from said defendant— the sum of— dollars, or thereabouts, and thereupon an attachment issued against the property of said defendant— as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendant— have been attached and seized by the sheriff of said county, under and by virtue of said writ.

And whereas, the said defendant— — desirous of having said property released from attachment.

Now, therefore, we, the undersigned, residents and — holders in the county of —, in consideration of the premises, and also in consideration of the release from said attachment of the property so attached, as above mentioned, do hereby jointly and

severally undertake, in the sum of — dollars, and promise that in case the plaintiff— recover judgment in the action, defendant— will, on demand, pay to plaintiff— the amount of whatever judgment may be recovered in said action, together with the percentage, interest and costs ; the same to be paid in United States gold coin, if so required by the terms of the judgment.

Dated at —, the — day }
of —, 18—.

———— [Seal.]

———— [Seal.]

———— [Seal.]

County of —, ss.

— and —, whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself, deposes and says : That he is a resident and — holder of the county of —, and is worth the sum in the said undertaking specified, as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

Sworn to before me, this — }
day of —, A. D. 18—.

No. 52.

Receipts to Sheriff.

\$—.

Oakland, —, 18—.

Received from Charles McCleverty, sheriff of Alameda county, —, in United States gold coin, being the amount of sale of real estate in the case of —, Superior Court, county of —, after deducting sheriff's costs and disbursements, amounting to \$—.

————,
Plaintiff's Attorney.

\$—.

Oakland, 18—.

Received from Charles McCleverty, sheriff of Alameda county, — dollars, in United States gold coin, being the amount of judgment, interest, costs, etc., due plaintiff, —, in the case of — v. —, Superior Court, — county of —.

————,
Plaintiff's Attorney.

No. 53.

Indemnity Bond in Attachment.

Know all Men by these Presents :

That we, —, of the county of —, as principal, and —, of the said county, and —, of the said county, —, as sureties, are held and firmly bound unto —, sheriff of the county of —, in the sum of — dollars, gold coin of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, —.

Dated, —, the — day of —, A. D. 18—, —.

Whereas, under and by virtue of a writ of attachment issued out of the Superior Court of the — county of —, of the State of —, in the action of —, plaintiff, against —, defendant, directed and delivered to said —, sheriff of the county of —, the said sheriff was commanded to attach and safely keep all the property of such defendant —, within his said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand ; amounting to — dollars, as therein alleged, and the said sheriff did thereupon attach the following described goods and chattels : — (description of goods).

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, — claimed the said goods and chattels as h— property, —.

And whereas, the said plaintiff, hereby expressly waiving a trial by a sheriff's jury of the right of property, — require of said sheriff that he shall retain said property under such attachment and in his custody.

Now therefore, the condition of this obligation is such, that if the said —, as principal, and — and — as sureties, their heirs, executors, and administrators, shall well and truly indemnify and save harmless him, the said sheriff, his heirs, executors, administrators, and assigns, of and from all and any damages, expenses, costs, and charges, including all counsel fees for which he, the said sheriff, his heirs, executors, administrators, or assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond ; and against all loss and

liability which he, the said sheriff, his heirs, executors, administrators, or assigns, shall sustain or in anywise be put to, for or by reason of the attachment, seizing, levying, taking, or retention by him, the said sheriff, in his custody, under said attachment of the property claimed as aforesaid.

And that it may be lawful for the said sheriff, his heirs, executors, administrators, or assigns, to bring suit against the principal and sureties hereto, or either of them, or their or either of their executors, administrators, or assigns, immediately upon the rendition of any judgment against the plaintiff in said cause or against the said sheriff, his heirs, executors, administrators, or assigns. And that said sheriff shall not be required first to pay the said judgment in order to entitle him or his legal representatives to maintain such suit and recover judgment thereon—then the above obligation to be void, otherwise to remain in full force and virtue.

In case suit or suits at law or in equity, or any proceeding to be brought against the said —, sheriff, or against him individually, or against him in any capacity, jointly with other person or persons, or alone, for, or on account of the property so levied upon, or for the conversion of the same, the said — shall and may select his own counsel to act in any such matter with the attorney or attorneys of the principal in this bond named, and the reasonable fees of such counsel shall be a charge against said principal and be secured by this bond. So likewise in case of suit or any event requiring the advice of counsel in and about the custody or detention of said property, the said — shall be at liberty to consult counsel of his own choice, and the reasonable fee of such counsel shall be secured by this bond. In addition, and as cumulative to remedy by suit against the sureties hereto, it is and shall be the right and privilege of the said —, immediately upon the rendition of any judgment against the plaintiff in this cause or against the said —, to apply in the court wherein such judgment was rendered, and upon filing this bond, to have judgment thereon rendered in his favor against the principal and sureties hereon for the full amount of any such judgment, including all costs, damages, expenses, and counsel fees as the said — may have incurred in the said action, as well as counsel fees for advice, and expense of keeping or storing property kept hereinunder. And the principal and sureties hereto expressly waive any notice

of any such application, and consent to the entry of such judgment, consenting and stipulating also that the estimate of said — as to the amount of expenses, counsel fees, storage, and the like, shall be final, binding, and conclusive. The remedies herein provided shall not exclude any other legal relief, but are cumulative to the other rights, legal and equitable, of said —. In case of any recovery against said — growing out of the seizure or detention of the property herein mentioned, then in any proceeding by said —, upon this bond, any defense based upon illegality of the consideration hereof, or the unlawfulness of the act or acts of said —, as sheriff, or otherwise, is hereby expressly waived.

Sealed and delivered in presence of _____, [Seal.]
 _____, [Seal.]
 _____, [Seal.]

City of —, county of —, ss.

— and —, whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself, deposes and says: That he is a resident and — holder of the county of —, and is worth the sum in the said undertaking specified, as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

Sworn to before me, this — }
 day of —, A. D. 18—. }

No. 54.

Indemnity Bond Under Execution.

Know all Men by these Presents:

That we, — of the county of —, as principal, and —, of the said county, and —, of the said county, —, as sureties, are held and firmly bound unto —, sheriff of the county of —, in the sum of — dollars, gold coin of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals —.

Dated, —, the — day of —, A. D. 18—, —.

~~Whereas~~ under and by virtue of a writ of execution, issued out of the Superior Court of the — county of —, of the State of —, in the action of —, plaintiff, against —, defendant, directed and delivered to said —, sheriff of the county of —, the said sheriff was commanded to satisfy the judgment, with interest, out of the personal property of such defendant within his county, not exempt from execution, and if sufficient personal property could not be found, then out of the real property belonging to him on the day when the said judgment was docketed, — or at any time subsequently, the said sheriff did thereupon levy upon and take into his possession the following described goods and chattels, to wit : — (description of goods).

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, — claimed the said goods and chattels as h— property, —.

And whereas, the said plaintiff hereby expressly waiving a trial by a sheriff's jury of the right of property, — require of said sheriff that he shall retain said property, under such levy, and sell the same, and apply the proceeds thereof to the satisfaction of said judgment, interest and costs of suit.

Now, therefore, the condition of this obligation is such, that if the said —, as principal, and — and —, as sureties, their heirs, executors and administrators, shall well and truly indemnify and save harmless him, the said sheriff, his heirs, executors, administrators and assigns, of and from all and any damages, expenses, costs and charges, including all counsel fees for which he, the said sheriff, his heirs, executors, administrators, or assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond ; and against all loss and liability which he, the said sheriff, his heirs, executors, administrators, or assigns, shall sustain or in anywise be put to, for or by reason of the attachment, seizing, levying, taking, retention in his custody, or selling by him, the said sheriff, under said writ, of the property claimed as aforesaid.

And that it may be lawful for the said sheriff, his heirs, executors, administrators, or assigns, to bring suit against the principal and sureties hereto, or either of them, or their or either of their executors, administrators, or assigns, immediately upon the rendition of any judgment against the plaintiff in such cause, or against the said sheriff, his heirs, executors, administrators, or assigns. And that said sheriff shall not be required first to pay the said

judgment in order to entitle him or his legal representatives to maintain such suit and recover judgment thereon—then the above obligation to be void, otherwise to remain in full force and virtue.

In case suit or suits at law, or in equity, or any proceeding to be brought against the said —, sheriff, or against him individually, or against him in any capacity, jointly with other person or persons, or alone, for or on account of the property so levied upon, or for the conversion of the same, the said — shall and may select his own counsel to act in any such matter with the attorney or attorneys of the principal in this bond named, and the reasonable fees of such counsel shall be a charge against said principal and be secured by this bond. So, likewise, in case of suit or any event requiring the advice of counsel in and about the custody or detention of said property, the said — shall be at liberty to consult counsel of his own choice, and the reasonable fee of such counsel shall be secured by this bond. In addition, and as cumulative to remedy by suit against the sureties hereto, it is and shall be the right and privilege of the said —, immediately, upon the rendition of any judgment against the plaintiff in this cause, or against the said —, to apply in the court wherein said judgment was rendered, and, upon filing this bond, to have judgment thereon rendered in his favor, against the principal and sureties hereon, for the full amount of any such judgment, including all costs, damages, expenses and counsel fees as the said — may have incurred in the said action, as well as counsel fees for advice, and expense of keeping or storing property kept hereinunder. And the principal and sureties hereto expressly waive any notice of any such application and consent to the entry of such judgment, consenting and stipulating also that the estimate of said — as to the amount of expenses, counsel fees, storage and the like, shall be final, binding and conclusive. The remedies herein provided shall not exclude any other legal relief, but are cumulative to the other rights, legal and equitable, of said —. In case of any recovery against said —, growing out of the seizure or detention of the property herein mentioned, then, in any proceeding by said — upon this bond, any defense based upon illegality of the consideration hereof, or the unlawfulness of the act or acts of said —, as sheriff, or otherwise, is hereby expressly waived.

Sealed and delivered in presence of

———— [Seal.]

———— [Seal.]

———— [Seal.]

City of —, county of —, ss.

— and —, whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself, deposes and says: That he is a resident and — holder of the county of —, and is worth the sum in the said undertaking specified, as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

Sworn to before me, this — }
day of —, A. D. 18—. }

NOTE.—In cases where the right of the claimant to the property is tried before a sheriff's jury, the bond, instead of reciting that the plaintiff waives a trial, should state that, "a jury was summoned by the said sheriff to try such claim, which said jury have, by their finding, decided," etc.; and if the verdict is in favor of the claimant, that "the said plaintiff, notwithstanding such finding, requires that said sheriff shall retain said property," etc.

No. 55.

Notice of Sale of Personal Property.

Sheriff's Sale.

Under and by virtue of an execution issued out of the Superior Court of the — county of —, State of —, and to me directed and delivered for a judgment rendered in said court, on the — day of —, A. D. 18—, in favor of —, and against —, for the sum of \$—, in —, together with costs of suit and interest, I have levied on all the right, title, claim and interest of said defendant, of, in and to the following property, to-wit: — (description).

Notice is hereby given that on — the — day of —, A. D. 18—, at — o'clock — M., of said day, I will sell all the right, title, and interest of said —, or either of them, in and to the above described property, or so much thereof as may be necessary to satisfy plaintiff's claim, besides all costs, interest, and accruing costs.

The sale will take place at —, at public auction, for — in hand, to highest and best bidder.

Dated, —, this — day of —, A. D. 18—.

—, Sheriff.

By —, Deputy Sheriff.

No. 56.

Notice of Sale of Real Estate under Execution.

 v. _____ } Sheriff's Sale.

No. ____.

By virtue of an execution issued out of the Superior Court of the ____ county of ____, of the State of ____, wherein ____, plaintiff, and ____, defendant, upon a judgment rendered the ____ day of ____, A. D. 18—, for the sum of ____ dollars, United States gold coin, besides costs and interest, I have this day levied upon all the right, title, claim, and interest of said defendant, ____, of, in and to the following described real estate, to-wit: ____ (description).

Public notice is hereby given that I will, on ____ the ____ day of ____, A. D. 18—, at ____ o'clock A. M. of said day, in front of the court-house door of the county of ____, sell at public auction, for United States gold coin, all the right, title, claim, and interest of said defendant, ____, of, in and to the above described property, or so much thereof as may be necessary to raise sufficient to satisfy said judgment, with interest and costs, etc., to the highest and best bidder.

_____, Sheriff.

Dated, ____, 18—.

No. 57.

Notice of Foreclosure Sale.

 _____ } Sheriff's Sale.
 v. _____ } No. ____.
 _____ }
 _____ }

Order of Sale and Decree of Foreclosure and Sale.

Under and by virtue of an order of sale and decree of foreclosure and sale, issued out of the Superior Court of the ____ county of ____, of the State of ____, on the ____ day of ____, A. D. 18—, in the above entitled action, wherein ____, the above named plaintiff, obtained a judgment and decree of foreclosure and sale against ____, defendant, on the ____ day of ____, A. D. 18—, for the sum of _____ dollars, in United States gold coin, besides interest, costs and counsel fees ____, which said

decree was, on the — day of —, A. D. 18—, recorded in judgment book — of said court, at page —, I am commanded to sell all th— certain lot, piece, or parcels of land, situate, lying and being in — county of —, State of —, and bounded and described as follows : — (description).

Public notice is hereby given that, on —, the — day of —, A. D. 18—, at — o'clock A. M. of that day, in front of the court-house door of the county of —, I will, in obedience to said order of sale and decree of foreclosure and sale, sell the above described property, or so much thereof as may be necessary to satisfy said judgment, with interest and costs, etc., to the highest and best bidder, for gold coin of the United States.

Dated, —, 18—.

—, Sheriff.

No. 58.

Certificate of Sale of Stock.

I, —, sheriff of the county of —, State of —, do hereby certify that, under and by virtue of the final judgment and decree of the Superior Court of the county of —, State of —, in a certain action lately pending in said court, at the suit of —, plaintiff, and against —, defendants, duly certified to me under the seal of said Superior Court on the — day of —, 18—, and to me, as such sheriff, duly directed and delivered, whereby I was commanded to sell the hereunto annexed certificate of stock according to law, and apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to the sum of \$—, in United States gold coin, with interest and costs of suit ; on the — day of —, 18—, at — o'clock —. M., at the court-house door, in the city —, in the said county of —, I duly sold at public auction, according to law, and after due and legal notice, to —, who made the highest bid therefor, at such sale, for the sum of \$—, in United States gold coin, which was the whole price paid for, the hereunto annexed certificate of stock in said order of sale described.

Given under my hand, this — day of —, 18—.

—,
Sheriff of the county of —.

No. 59.

Certificate of Sale of Real Estate under Execution.

In the Superior Court of the — county of —, State of —.

_____	}	Sheriff's Certificate of Sale of Real Estate on Execution.

Plaintiff		
v.		

Defendant		

County of —, ss.

I, — sheriff of the county of —, do hereby certify that by virtue of an execution in the above case, tested the — day of —, 18—, by which I was commanded to make the amount of — dollars, — to satisfy the judgment in this action, with costs and interest thereon, out of the personal property of —, the above defendant—, and if sufficient personal property could not be found, then out of the real property belonging to the said —, on the — day of —, A. D. 18—, or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears ; I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to —, who was the highest bidder, for the sum of — dollars, —, which was the whole price paid by him for the right, title, and interest of said defendant—, of, in and to the real estate described as follows, to-wit : (description).

That the price of each distinct lot and parcel was as follows : —, Lot B., in block 2, was sold to — for \$50.00, lawful money of the United States ; Lot C., in block 4, was sold to — for \$70.00, lawful money of the United States.

And that the said real estate is subject to redemption, in —, pursuant to the statute in such cases made and provided.

Dated, —, this — day of —, A. D. 18—.

_____, Sheriff.

By _____, Deputy Sheriff.

No. 60.

Certificate of Sale under Foreclosure.

I, —, sheriff of the county of —, State of —, do hereby certify that, under and by virtue of the final judgment and decree

of the Superior Court of the — county of —, of the State of —, in a certain action lately pending in said Superior Court, at the suit of —, plaintiff—, and against —, defendant, duly certified to me under the seal of said Superior Court, the — day of —, A. D. 18—, and an order of sale thereon, issued to me as such sheriff, duly directed and delivered, whereby I was commanded to sell the property hereinafter described, according to law, and apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to the sum of — dollars, in United States gold coin, with interest, counsel fees, taxes and costs of suit, amounting in all to the sum of — on the — day of —, A. D. 18—, at — o'clock, —M., at the courthouse door, in the city of —, in the said county of —, I duly sold at public auction, according to law, and after due and legal notice, to —, who made the highest bid therefor at such sale, for the sum of — dollars, in United States gold coin, —, which was the whole price paid, the real estate in said order of sale, described as follows, to wit : — (description of property sold).

And I do hereby further certify that the said property was sold in — lots —or parcels, as follows :

Lot 1, in block 5, was sold to — for \$1000.00, U. S. gold coin.
Lot 2, in block 5, was sold to — for \$800.00, U. S. gold coin.
That the said sum of — dollars, in United States gold coin, was the highest bid made, and the whole price paid therefor, and that the same is subject to redemption, in United States gold coin, pursuant to the statute in such cases made and provided.

Given under my hand, this — day of —, A. D. 18—.

—, Sheriff.

By —, Deputy Sheriff.

No. 61.

Deed under Execution.

This indenture, made this — day of —, A. D. 18—, between — sheriff of the county of —, of the first part, and —, of the — county of —, and State of —, of the second part :

Whereas, by virtue of a writ of execution issued out of, and under the seal of, the Superior Court — of the State of —, tested the — day of —, A. D. 18—, upon a judgment recov-

ered in said court on the — day of —, A. D. 18—, in favor of —, and against —, to the said sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor in his county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made of the lands, tenements and real property belonging to him on the — day of —, A. D. 18—, or at any time afterwards.

And, whereas, because sufficient personal property of the said judgment debtor could not be found, whereof he, the said sheriff, could cause to be made the moneys specified in said writ, he, the said sheriff, did, in obedience to said command, levy on, take and seize all the estate, right, title and interest which the said judgment debtor so had of, in and to the lands, tenements, real estate and premises, hereinafter particularly set forth and described, with the appurtenances, and did, on the — day of —, A. D. 18—, sell the said premises, at public vendue, at the court-house door, in the city of —, county of —, between the hours of nine in the morning and five in the afternoon of that day, namely : at — o'clock — M., after first having given notice of the time and place of such sale, by advertising the same according to law ; at which sale, the said premises were struck off and sold to —, for the sum of —, United States gold coin, he, the said —, being the highest bidder, and that being the highest sum bidden, and the whole price paid for the same.

And, whereas, the said sheriff, after receiving from said purchaser the said sum of money so bidden as aforesaid, gave to him such certificate as is by law directed to be given, and filed in the office of the recorder of the county of — a duplicate of such certificate.

And, whereas, six months after such sale have expired without any redemption of the said premises having been made.

Now this indenture witnesseth, that I—, the sheriff aforesaid, and party hereto of the first part, by virtue of said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of money above mentioned, to him in hand paid, as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said —, his

— heirs and assigns, all the estate, right, title and interest of the said —, which — had on the said — day of —, A. D. 18—, or at any time afterwards, or now — of, in and to all the following described premises, viz : — (description), together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold the said above mentioned and described premises, with the appurtenances, unto the said —, heirs and assigns forever, as fully and absolutely as he, the sheriff aforesaid, can, may, or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain, sell, release, assign, convey and confirm the same.

In witness whereof, the said sheriff, the party of the first part to these presents, hath hereunto set his hand and seal the day and year first above written.

Sealed and delivered in the presence }
of _____ } _____ [Seal.]
_____ } Sheriff of the county of—
_____ }

No. 62.

Deed under Foreclosure.

This indenture, made the — day of —, in the year of our Lord one thousand eight hundred and —, between —, sheriff of the county of —, State of —, the party of the first part, and —, the part— of the second part, witnesseth :

Whereas, in and by a certain judgment or decree, made and entered by the Superior Court of the — county of —, of the State of —, on the — day of — A. D. 18—, in a certain action then pending in said court, wherein — was plaintiff, and — was defendant, and of which said judgment or decree a certified copy, with an order of sale from said court, was delivered to said party of the first part, as such sheriff, for execution, it was among other things ordered, adjudged, and decreed, that all and singular the mortgaged premises described in the complaint in said action, and specifically described in said judgment or decree, should be sold at public auction by the sheriff of the said county of —, in the manner required by law, and according to the course and practice of said court; that such sale be made —, in the said county of —, between the hours of

nine o'clock in the forenoon and five o'clock in the afternoon on such day as the said sheriff should appoint, that any of the parties to said action might become the purchaser at such sale ; and that said sheriff should execute the usual certificates and deeds to the purchaser or purchasers, as required by law :

And whereas, the said sheriff did at the hour of — o'clock —. M., on the — day of —, A. D. 18—, after due public notice had been given, as required by the laws of this State, and the course and practice of said court, duly sell at public auction in the said county of —, agreeably to said judgment or decree, and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the premises in said judgment or decree, and hereinafter described, were fairly struck off to the said —, the said part — hereto of the second part, for the sum of — dollars, — being the highest bidder —, and that being the highest sum bid for the same :

And whereas, the said — thereupon paid to the said sheriff the sum of money so bid by —:

And whereas, the said sheriff thereupon made and issued the usual certificate in duplicate of the said sale in due form of law, and delivered one thereof to the said purchaser, —, and caused the other to be filed in the office of the county recorder of said county of —:

And whereas, more than six months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtor, the said —, or by or on behalf of any other person. (Recital of any assignment that may have been made.)

Now this indenture witnesseth : That the said party of the first part, the said sheriff, in order to carry into effect the sale so made by him as aforesaid, in pursuance of said judgment or decree, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of — dollars, — so bid and paid to him by the said purchaser, —, the said —, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the said part— of the second part, and to — heirs and assigns forever, all th— certain lot—, piece—, or parcel— of land situate, lying, and being in the said county of —, State of —, and bounded and particularly described as follows, to-wit: (description). Together

with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, and interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, and of said defendant, —, of, in and to the said premises, and every part and parcel thereof.

To have and to hold, all and singular, the said premises hereby conveyed, or intended so to be, together with the appurtenances, unto the said part— of the second part, — heirs and assigns, to — their own proper use, benefit, and behoof forever.

In witness whereof, the said party of the first part to these presents, has hereunto set his hand and seal the day and year first above written. _____, [Seal.]

Sheriff of the county of —, State of —.

No. 63.

Monthly Statement of Fees to Auditor.

State of —, }
County of —. } ss.

I, —, of said county, hereby certify that the total amount of fees due from me to the county treasury of said county, for the month of —, 18—, as shown by the fee book in my office, is — dollars (\$—₁₀₀). _____

State of —, }
County of —. } ss.

I, —, do swear that the fee book in my office contains a true statement, in detail, of all fees and compensation of every kind and nature, for official services rendered by me, my deputies and assistants, for the month of —, A. D. 18—, and that said fee book shows a full amount received or chargeable in said month and since my last monthly payment; and neither myself, nor, to my knowledge or belief, any of my deputies or assistants, have rendered any official service, except for the county, which is not fully set out in said fee book, and that the foregoing statement thereof is true and correct.

Subscribed and sworn to before me, }
this — day of —, 18—. }

Deputy County Treasurer.

No. 64.

Semi-Yearly Statement of Fees to Auditor.

State of —, }
County of —, } ss.

I hereby certify that the amount of fees earned, collected or chargeable by me, as —, for the six months ending —, 18—, is — dollars.

\$—. Witness my hand this — day of —, 18—.

Sheriff of the county of —.

State of —, }
County of —, } ss.

—, being duly sworn, says that the above statement is correct.

Subscribed and sworn to before }
me, this — day of —, 18—. } _____

_____ } Sheriff of the county of —.

No. 65.

Monthly Statement of Jailor to County Auditor.

List of Prisoners Confined in the County Jail of — County,
During the Month of —, 18—.

Names.	No. of Days.	Remarks.
<p>State of —, } County of —, } ss.</p>		
<p>I, —, sheriff of the county of —, do swear that the foregoing statement is true.</p>		
<p>Subscribed and sworn to } before me, this — day } of —, 18—. }</p>		<p>_____, Sheriff.</p> <p>_____</p>

No. 66.

Certificate of Redemption of Real Estate.

State of —, }
County of —, } ss.

I, —, sheriff of the county of —, State of —, do hereby certify that on the — day of —, 18—, Mary Jucksch, judgment debtor under the judgment in the action hereinafter men-

tioned, in due form of law, tendered and paid to me the sum of \$188.00, being in full payment of the purchase price paid by the purchaser at the sale of the real property hereinafter described, made by me on the — day of —, 18—, under the decree of foreclosure and sale, issued to me out of the Superior Court of the city and county of San Francisco, State of California (No. 22,764), in the action of La Societe Francaise de Epargnes et de prevoyance Mutuelle v. The Berkeley Land and Town Improvement Association, Mary Jucksch, *et als.*, including two per cent. per month interest thereon, up to the time of redemption, together with the amount of all taxes and assessments paid by the purchaser on said property, after said purchase, and interest thereon. That, thereupon, I received said sum of money so tendered and paid as aforesaid, and have granted and executed to said Mary Jucksch this, my certificate of redemption of said property, in conformity with the statute in such case made and provided. The premises so redeemed, or intended to be redeemed, are described as follows, to wit: — (description).

In witness whereof, I have hereunto set my hand
this — day of —, 18—.

Sheriff of the county of —.

County of Alameda. ss.

Personally appeared before me, this — day of —, 18—, the above named —, to me known to be the person who executed the foregoing certificate of redemption, as the sheriff of said county, and who acknowledged that he executed the same for the uses and purposes therein mentioned.

No. 67.

Grand Jury Subpoena.

The People of the State of — to —:

You are commanded to appear before the Grand Jury of the county of —, State of —, at the Grand Jury room, in the court-house of said county, on the — day of —, A. D. 18—, at — o'clock, —. M., as —, witness — in a criminal action prosecuted by the People of the State of —.

Given under my hand this — day of —, A. D. 18—.

_____,
District Attorney.

No. 68.

Criminal Subpoena.

In the Superior Court of the county of —, State of—.

The People of the State of — }
against } Subpoena.
 —,

The People of the State of — to — :

You are commanded to appear before the Superior Court of the county of —, State of —, at the court-room of said court, at the court-house, in the city of —, county of —, department No. —, on the — day of —, A. D. 18—, at — o'clock, —. M., as — witness — in a criminal action prosecuted by the People of the State of — against —, on the part of the —.

By order of the court.

Given under my hand this — day of —, A. D. 18—.

—, Clerk.

By —, Deputy Clerk.

No. 69.

Grand Jury Summons.

Grand Jury Summons.

Sheriff's Office, —, }
 —, 18,—. }

Mr. —,

Sir : Having been regularly drawn as such, you are hereby summoned to be and appear in the court-room of department — of the Superior Court of the county of —, in the county court-house of said county, on — day, the — day of —, A. D. 18—, then and there to serve as a Grand Juror, —.

Herein fail not, under penalty of the law.

—, Sheriff.

By —, Deputy Sheriff.

No. 70.

Trial Jury Summons.

Trial Jury Summons.

Sheriff's Office, —, }
—18—. }

Mr. —

Sir: Having been regularly drawn as such, you are hereby summoned to attend the Superior Court, department No. —, of — county, at the court-house, in the city of —, in said county, on —, the — day of —, A. D. 18—, at — o'clock, A. M. of that day, then and there to serve as a trial juror for the — session of said court.

Herein fail not, under penalty of the law.

—, Sheriff.
By —, Deputy Sheriff.

No. 71.

Special Jury Summons.

Special Jury Summons.

Sheriff's Office, —, }
—18—. }

Mr. —

Sir: You are hereby summoned to attend the Superior Court, department No. —, of — county, at the court-house, in the city of —, in said county, on —, the — day of —, A. D. 18—, at — o'clock, A. M. of that day, then and there to serve as a trial juror, for the — session of said court.

Herein fail not, under penalty of the law.

—, Sheriff.
By —, Deputy Sheriff.

No. 72.

Sheriff's Inventory and Keeper's Receipt.

— }
v. } Sheriff's Inventory.
— }

By virtue of a writ of — against the defendant in the above entitled cause, for \$—, with interest and costs, duly attested

the — day of —, A. D. 18—, I have levied upon the following property upon the premises of —, and in — possession, —, to-wit : (description).

Dated at —, this — day of — 18—.

_____,
Sheriff of the county of —.

By —, Deputy Sheriff.

The following is the keeper's indorsement on above form :

Keeper's Receipt.

I hereby acknowledge that I have received the within described property so levied upon by the sheriff of — county, from said sheriff, and hereby promise and undertake to return the same, and every part thereof, to the said sheriff on demand. —.

Dated, —18—.

_____, Sheriff's Keeper.

No. 73.

Return on Habeas Corpus.

Sheriff's Office, _____, } ss.
County of —, }

I do hereby return to the honorable judge of the Superior Court of — county, that before the coming to me of the within writ, the said Petroleum V. Nasby was committed to my custody, and is detained by virtue of a commitment, a copy of which is hereto annexed, the original of which I also herewith produce ; nevertheless, I have the body of the said Petroleum V. Nasby before you at the time and place within mentioned, as I am within commanded.

_____,
Sheriff of the county of —.

Dated, —, 18—.

No. 74.

Return on Death Warrant.

State of California, _____, } ss.
County of Alameda. }

I, Charles McCleverty, sheriff of the county of Alameda, do hereby certify and return that I received the within warrant on

the 3d day of January, A. D. 1884, and that, in compliance with three certain orders of reprieve, granted by the Honorable George Stoneman, governor of the State of California, and issued under the great seal of the State of California, and delivered to me, the execution of the within named Lloyd L. Majors was postponed by me until the 23d day of May, A. D. 1884, on which said last named day, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of said day, to wit : between the hours of 11 and 12 o'clock of said day, in pursuance of said warrant and reprieves, said Lloyd L. Majors was executed by me, as such sheriff, by hanging by the neck until he was dead, in the jail yard of the jail of said county of Alameda ; and that said execution was conducted in conformity to the provisions of law of this State concerning capital punishment, and of the sentence referred to in said warrant.

Charles McCleverty,

Sheriff of the county of Alameda.

Dated, Oakland, this 24th day of May, A. D. 1884.

CHAPTER XXIV.

FEES OF SHERIFFS AND CONSTABLES.

FEES OF SHERIFFS.

In the counties of Alpine, Alameda, Amador, Butte, Calaveras, Del Norte, Fresno, Inyo, Kern, Lake, Lassen, Mariposa, Mono, Merced, Napa, Nevada, Placer, Plumas, San Joaquin, Shasta, Santa Barbara, Sierra, Solano, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, Ventura, Sacramento, and San Mateo, the sheriff receives the following fees, excepting that in Del Norte county sheriffs' commissions are two per cent. on the first thousand dollars, and one per cent. on all sums above that amount, when property is sold; and one-and-a-half and one per cent. when no sale takes place:

For serving a summons and complaint, or any other process by which an action or proceeding is commenced, on each defendant \$1 00

For serving an attachment on property, or levying an execution, or executing an order of arrest, or order for the delivery of personal property 2 00

For serving an attachment upon any ship, boat, or vessel, in proceedings to enforce any lien thereon created by law 3 00

For his trouble and expense in taking and keeping possession of and preserving property under attachment or execution, or other process, such sum as the court shall order, provided that no more than \$3 per diem shall be allowed to a keeper—if allowed by court, per day \$3 00

For taking bond or undertaking in any case in which he is authorized to take the same ... 1 00

For copy of any writ, process, or other paper, when demanded or required by law, for each folio 20

For serving every notice, rule, or order ... 1 00

For advertising property for sale on execution, or under any judgment or order of sale, exclusive of the cost of publication, each notice 1 00

For serving a writ of possession or restitution, putting a person in possession of premises and removing the occupant 3 00

For holding each inquest, or trial, or right of property, to include all service in the matter, except mileage 3 00

For serving a subpoena, for each witness summoned 50

For traveling, to be computed in all cases from the court-house, to serve any summons and complaint, or any other process by which an action or proceeding is commenced, notice, rule, order, subpoena, attachment on property, to levy an execution, to post notice of sale, to sell property under execution or other order of sale, to execute an order for the delivery of personal property, writ of possession or restitution, to hold inquest or trial of right of property, or in executing a writ of habeas corpus: *provided*, that if any two

or more papers be required to be served in the same suit, at the same time and in the same direction, one mileage only shall be charged, to the most distant points to complete such service; for each mile necessarily traveled, in going only \$0 30

Provided, in the county of San Diego he shall receive for each mile necessarily traveled, in going only 50

For commissions for receiving and paying over money on execution, or other process, when lands or personal property has been levied on and sold, on the first one thousand dollars, three per cent.; on all sums above that amount, two per cent.

For commissions for receiving and paying over money on execution without levy, or where the lands or goods levied on shall not be sold, on the first one thousand dollars, one-and-one-half per cent.; and one per cent. on all over that sum.

The fees herein allowed for the levy of an execution, costs for advertising, and percentage for making or collecting the money on execution, shall be collected from the judgment debtor, by virtue of such execution, in the same manner as the sum herein directed to be made.

For drawing and executing a sheriff's deed, to include the acknowledgment, exclusive of stamps, to be paid by the grantee before delivery ... 3 50

For executing a certificate of sale, exclusive of the filing and recording of the same 1 00

For attending, when required, on any court of record, in person or by deputy, for each day, to be paid out of the county treasury 3 00

For making every arrest in a criminal proceeding 2 00

For summoning a grand jury of twenty-four persons \$8 00

For summoning a trial jury of twelve persons or less 4 00

For summoning each additional juror ... 25

For executing every sentence of death ... 20 00

For all civil services arising in Justice's Courts, the same fees as are allowed to constables for like services.

For every mile necessarily traveled, in going only, in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on habeas corpus, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding; *provided*, that in serving a subpoena or venire, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged 30

Provided further, that in the counties of Alameda and Sacramento, for every mile necessarily traveled, in any criminal case 20

And in the counties of Inyo and Mono ... 40

For conveying a prisoner, when under arrest, the necessary expenses incurred in the transportation.

In addition to the above an Act was passed by the legislature in 1878, relative to the duties of the sheriff of Alameda county, as follows:

In all cases where a keeper is required, by either the plaintiff or defendant, to take charge of property seized on attachment, execution, or other process, the sheriff shall be allowed and be paid by the party requiring such keeper, the sum of \$3 per day as compensation for such keeper; and in case no keeper is required, then

the sheriff shall be allowed to charge, collect, and retain, to his own use, such sums of money as he shall reasonably and necessarily incur and disburse in the taking, keeping, preserving, removing, and storing any property so seized as aforesaid, and he shall not be required to release or re-deliver said property until all such expenses are refunded. The sheriff shall also be allowed to retain to his own use one-half of the mileage provided for in his fee bill, to cover in part the necessary traveling expenses of himself and his deputies, in the discharge of their official duties; *provided*, no mileage shall be charged or collected by the sheriff or his deputies for services performed by them for the county of Alameda.

IN YUBA COUNTY THE SHERIFF'S FEES ARE

AS FOLLOWS:

Serving summons	...	...	...	...	\$2 00
Taking bond or undertaking	...	...	...	...	1 00
Copies of any paper, per folio	...	...	...	...	20
Serving every notice, rule, or order	...	...	...	...	1 00
Serving subpoena, each witness	...	...	...	...	50
Attachment	...	...	...	...	2 00
Levying execution	...	...	...	...	2 00
Executing order of arrest	...	...	...	...	2 00
Executing order for delivery of personal property	...	...	...	...	2 00
Keeper's fees, allowed by court, per day	...	...	...	...	3 00
Attachment on ship, boat, or vessel	...	...	...	...	2 00
Selling boat or vessel, fees and expenses same as for sales on execution.	...	...	...	...
Advertising sales, exclusive of printing	...	...	...	...	2 00
Commissions on sales, two per cent on the first \$1000; and one per cent. on all over that amount.	...	...	...	...

Commissions where no sale, one-and-one-half per cent. on the first \$1000; one per cent. on all over that amount.

Sheriff's deed, including acknowledgment	\$3 00
Serving writ of possession or restitution ...	5 00
Attendance on court, per day ...	3 00
Holding trial of right of property ...	5 00
Arrest in criminal proceeding ...	2 00
Summoning grand jury ...	8 00
Summoning trial jury ...	6 00
Each additional juror ...	50
Mileage, going only, per mile ...	25
Executing sentence of death ...	50 00
For services in Justices' Courts, the same fees as are allowed to constables.	

THE FEES OF THE SHERIFF OF SAN BERNARDINO
COUNTY ARE AS FOLLOWS:

Serving summons ...	\$1 00
Serving attachment ...	2 00
Levying execution ...	2 00
Executing order of arrest ...	2 00
Executing order for delivery of personal property ...	2 00
Attachment of ship, boat, or vessel ...	3 00
Keeper's fees, to be allowed by court, not over, per day ...	3 00
Taking bond or undertaking ...	1 00
Copies of writs or other paper, per folio ...	20
Serving every notice, rule, or order ...	1 00
Advertising property, exclusive of printing, each notice ...	1 00
Serving writ of possession or restitution ...	3 00
Trial of right of property, excepting mileage	3 00

Serving subpoena, each witness	...	...	\$0 50
Mileage in civil cases, per mile	...	...	30
Commissions, when sale, two per cent. on the first \$1000 ; on sums above that amount, one-and-one-half per cent.			
Commissions, when no sale, one-and-one-half per cent. on the first \$1000 ; one per cent. on all over that amount.			
Sheriff's deed, including acknowledgment			3 00
Certificates of sale, exclusive of recorder's fees, each	...	...	1 00
Attendance on court, per day	...	...	3 00
Arrests in criminal cases	...	...	2 00
Summoning grand jury	...	...	8 00
Summoning trial jury of twelve persons	...	...	4 00
Summoning each additional juror	...	...	25
Executing sentence of death	...	...	40 00
Mileage in criminal cases, per mile		...	30
For conveying prisoner when under arrest, the necessary expenses incurred.			

THE FEES OF THE SHERIFF OF COLUSA COUNTY

ARE AS FOLLOWS :

For serving a summons and complaint, or any other process by which an action or proceeding is commenced, on each defendant \$0 50

For serving an attachment, or levying an execution, or executing an order of arrest, or order for the delivery of personal property ... 1 00

For serving an attachment on any ship, boat, or vessel, in proceedings to enforce any lien thereon created by law 2 00

For his trouble and expense in taking and keeping possession of and preserving property

under attachment or execution, or other process, such sum as the court shall order; *provided*, that no more shall be allowed to a keeper, per diem, than \$2 00

For taking bond or undertaking ... 50

For copy of any writ or paper required, per folio 15

For serving every notice, rule, or order 50

For advertising property for sale, exclusive of cost of publication, for each notice ... 50

For serving writ of possession and restitution 3 00

For holding each inquest, or trial of right of property, to include all services in the matter except mileage 3 00

For serving a subpoena, for each witness 25

For traveling, whenever traveling is necessary, in the performance of any duty required of him by law, other than taking prisoners to the state's prison or insane persons to the insane asylum, to be computed from the court-house, per mile 25

Provided, that for serving process, or serving or posting notices or papers, in the same action or proceeding, in the same direction, and at the same time, one mileage only shall be charged.

For commissions for receiving and paying over money on execution, or other process, when land or personal property has been levied on and sold, on the first \$1000, one-and-one-half per cent.; and one per cent. on all sums over that amount; *provided*, the aggregate amount on any execution shall not exceed \$100.

For commissions for receiving and paying over money on execution without levy, or where the

lands or goods levied on shall not be sold, on the first \$1000, one-and-one-half per cent., and one per cent. on all sums over that amount; *provided*, the aggregate amount shall not exceed the sum of \$25.

The fees herein allowed for the levy of an execution, cost for advertising, and percentage for making and collecting the money on execution, shall be collected from the judgment debtor, by virtue of such execution, in the same manner as the sum therein directed to be made.

For drawing and executing a sheriff's deed, exclusive of acknowledgment, to be paid by the grantee, before delivery \$3 00

For executing a certificate of sale, exclusive of the filing and recording 1 00

For attending, when required, on any court of record, in person, or by deputy, for each day 3 00

For making every arrest, in a criminal proceeding 1 00

For summoning a grand jury of twenty-four persons 8 00

For summoning a trial jury of twelve persons, or less 3 00

For summoning each additional juror 25

For executing every sentence of death 50 00

For all services in Justices' Courts, the same fees as are allowed to constables for like services.

For conveying a prisoner when under arrest, the necessary expenses incurred in the transportation.

For all services rendered and performed by the sheriff, as *ex-officio* tax collector, he shall receive \$1200 per annum, paid out of the common fund.

THE SHERIFF OF SAN LUIS OBISPO COUNTY

RECEIVES FEES AS FOLLOWS:

Serving summons, each defendant	....	....	\$1 00
Attachment	....	....	1 50
Levying execution	....	....	1 50
Executing order of arrest	....	....	1 50
Executing order for delivery of personal prop- erty	....	....	1 50
Attachment on ship, boat, or vessel		....	3 00
Keeper's fees, to be allowed by court, per day	....	....	3 00
Taking bond or undertaking	....	...	50
Copies of writs or other papers, per folio	....		20
Serving any notice, rule, or order	....	....	50
Advertising sale, exclusive of printing, each notice	....	....	1 00
Serving writ of possession or restitution	...		3 00
Holding trial of right of property	...	...	3 00
Serving subpoena, each witness	...	...	50
Mileage, in civil and criminal cases, per mile			30
Commissions, whether property sold or not, two per cent. on the first \$1000 ; and one per cent. on all over that amount.			
Sheriff's deed, including acknowledgment	...		3 50
Certificates of sale, each	...	...	1 00
Attendance on court, per day	...	...	3 00
Arrests in criminal proceedings	...	...	2 00
Summoning grand jury	...	...	8 00
Summoning trial jury	...	...	4 00
Each additional juror	...	...	25
Executing every sentence of death	...		20 00
For civil services in Justices' Courts, the same fees as are allowed to constables.			

For conveying a prisoner under arrest, the necessary expenses incurred in the transportation.

THE FEES ALLOWED TO SHERIFFS IN THE COUNTIES OF
HUMBOLDT, MONTEREY, SANTA CLARA, LOS AN-
GELES, SANTA CRUZ, SAN BENITO, AND
TULARE, ARE AS FOLLOWS :

For serving summons, each defendant	...	\$1	00
For taking bond or undertaking	... ..		50
Copies of writ or other paper, per folio	...		15
Serving every notice, rule, or order	...		50
Serving subpoena, each witness	... ..		25
Attachment	... ..	1	50
Levying execution	... ..	1	50
Executing order of arrest	... ..	1	50
Executing order for delivery of personal prop- erty	... ..	1	50

No traveling fees allowed on attachment, order of arrest, or order for delivery of personal property, when the same accompanies the summons in the suit and may be executed at the time of the service of the summons, unless for the distance actually traveled beyond that required to serve the summons.

Keepers' fees, to be allowed by court, not ex- ceeding, per day	... ..	3	00
Attachment on vessel	... ..	1	50

Care of vessel under attachment, all necessary expenses, allowed by court, and in addition, per day	3	00
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For selling any boat, vessel, or tackle, apparel, or furniture thereof so attached, or other goods attached, and for advertising such sale, the same fees as on execution.

For advertising property for sale on execution, or under any judgment or order of sale, exclusive of cost of publication \$1 00

Commissions on sale, two per cent. on the first \$1000, and one per cent. on all sums above that amount.

Commissions without levy or sale, one-and-one-half per cent. on the first \$1000, and one per cent. on all over that sum.

Costs on execution are to be collected from the judgment debtor.

Sheriff's deed, including acknowledgment	4 00
Serving writ of possession or restitution ...	5 00
Attendance on court of record, per day ...	3 00
For holding inquest or trial of right of property, including all service except mileage ...	3 00
Arrest in criminal proceeding	2 00
Summoning a grand jury	6 00
Summoning trial jury	3 00
Each additional juror	20

For traveling, to be computed in all cases from the court-house, to serve any summons and complaint, or any other process by which action or proceeding is commenced, notice, rule, order, subpoena, venire, attachment on property, or to levy an execution, or execute an order of arrest, or order for the delivery of personal property, writ of possession or restitution, to hold inquest or trial of right of property, or in bringing up a prisoner on writ of habeas corpus, for each mile necessarily traveled, in going only 25

For traveling to serve any process in criminal cases, or for taking a prisoner from prison before a court or magistrate, for each mile necessarily traveled, in going only 20

For taking a prisoner from the place of arrest to prison, or before a court or magistrate, for each mile necessarily traveled, in going only ... \$0 25

For each additional prisoner taken at the same time ... 15

Provided, that if any two or more papers be required to be served in the same suit or proceeding, at the same time and in the same direction, one mileage only shall be charged ; and *provided*, also, in serving a subpoena or venire, when two or more jurors or witnesses live in the same direction, traveling fees shall be charged only for the most distant ; and *provided*, further, that only one mileage per day shall be charged for taking a prisoner from prison, before a court or magistrate ; *provided*, that in the county of Santa Clara the sheriff shall be entitled to thirty cents per mile, going only, as traveling fees in civil cases.

For executing every sentence of death ... 20 00

For all services in Justices' Courts, the same fees as are allowed to constables.

THE FEES RECEIVED BY THE SHERIFF OF MENDOCINO COUNTY ARE AS FOLLOWS :

Serving summons	...	...	...	...	\$0	50
Attachment	...	...	...	...		75
Levying execution	...	...	...	...		75
Executing order of arrest	...	...	...	...		75
Executing order for delivery of personal property	...	...	...	...		75
Attaching ship, boat, or vessel	...	...	...	...	1	25
Keeper's fees, per day, to be allowed by court	...	...	...	...	1	50
Taking bond or undertaking	...	...	...	...		25

Copies of papers, per folio	...	...	...	\$0 10
Serving every notice, rule, or order	...	...	...	25
Advertising property for sale, exclusive of printing, each notice	...	...	...	50
Serving writ of possession or restitution	...	...	...	2 00
Holding trial of right of property	...	...	...	3 00
Serving subpoena, each witness	...	...	...	25
Mileage	...	...	...	25
Commissions in all cases one per cent.				
Sheriff's deed, including acknowledgment				2 50
Certificate of sale, each	...	...	...	75

THE FEES OF THE SHERIFF OF EL DORADO COUNTY
ARE AS FOLLOWS :

For serving summons	...	...	...	\$1 00
Mileage, per mile	...	...	...	50
Taking bond or undertaking	...	...	...	1 00
Copies of any writ or other paper, per folio				30
Serving every notice, rule, or order	...	...	...	1 00
Serving subpoena, each witness	...	...	...	50
Serving attachment	...	...	...	2 00
Levying execution	...	...	...	2 00
Executing order of arrest	...	...	...	2 00
Executing order for delivery of personal property	...	...	...	2 00

For traveling, per mile, to serve an attachment, execution, order of arrest, or order for delivery of personal property, or serving a subpoena, for each mile traveled, in going only, per mile ... 50

Provided, that if served with the summons in the suit, no mileage shall be charged, if served in the same direction, unless for distance actually traveled beyond that required to serve the summons; *provided*, also, that when two or more per-

sons are subpoenaed in the same suit at the same time, mileage shall be charged for the most distant only, if living in the same direction.

For making and posting notices, and advertising property for sale on execution, or under any judgment or order of sale, not to include the cost of publication in a newspaper \$2 00

For commissions for receiving and paying over money on execution or process, when lands or personal property has been levied on, advertised and sold, four per cent. on the first \$500; three per cent. on all over \$500 and under \$1000; two per cent. on all over \$1000 and under \$1500; one per cent. on all over \$1500.

Commissions, without sale, two per cent. on the first \$1000, and one per cent. on all over that sum.

Fees under execution are to be collected from the defendant.

Sheriff's deed, exclusive of acknowledgment 3 00

Serving writ of possession or restitution ... 5 00

Holding inquest or trial of the right of property, to include all services in the matter, except mileage 5 00

For mileage, to serve any process in civil cases, per mile 50

For services in Justices' Courts, the sheriff receives the same fees as are allowed constables.

Mileage in criminal cases, per mile ... 20

For taking a prisoner before a magistrate or to prison, or service of process in any criminal case, he shall receive mileage for the most distant only, where witnesses or parties upon which service is made live in the same direction.

THE SHERIFF'S FEES IN THE COUNTY OF CONTRA
COSTA ARE AS FOLLOWS :

For serving a summons and complaint, or any other process by which an action or proceeding is commenced, on each defendant \$1 00

For taking a bond or undertaking 50

Copy of writ or any other paper, per folio 15

Provided, that he shall not be entitled to any fees for copies of pleadings or original papers served by him when such copies have been furnished him by the clerk, or person requiring the service.

For serving every notice, rule, order, or subpoena, on each person served 50

Serving an attachment 1 50

Levying an execution 1 50

Executing an order of arrest 1 50

Executing order for delivery of personal property 1 50

Serving an attachment on any ship, boat, or vessel in proceedings to enforce any lien thereon created by law 1 50

For keeper's fees while such ship, boat, or vessel is in the actual custody of the sheriff, per day 3 00

Together with such further necessary expenses, resulting from such custody, as are supported by the oath of the officer making such service, and as shall be allowed by the court.

For selling any boat, vessel, or tackle, apparel or furniture thereof so attached, or other goods attached, and for advertising such sale, the same fees as for sale on execution.

For advertising property for sale on execution, or under any judgment or order of sale, exclusive of the cost of publication \$1 00

For commissions for receiving and paying over money on execution or other process, when lands or personal property have been levied on and sold, on the first \$1000 or sums less than \$1000, two per cent.; on all sums above \$1000 and not exceeding \$20,000, one-and-one-half per cent.; on all sums above \$20,000, one per cent.

For commissions for receiving and paying over money on execution without levy, or when the land or goods levied on shall not be sold, on all sums less than \$1000 and not exceeding \$1000, one-and-one-half per cent.; for all sums above \$1000 and not exceeding \$20,000, one per cent.; on all sums above \$20,000, one-half of one per cent.

The fees herein allowed for the levy of an execution, and for advertising, and for making or collecting money on execution, shall be collected from the judgment debtor, by virtue of the execution, in the same manner as the judgment shall be therein directed to be paid; *provided*, that when the judgment creditor purchases property sold on execution in satisfaction thereof, he shall pay the sheriff his fees before any certificate of sale shall be issued or satisfaction entered.

For drawing and executing a sheriff's deed, to include acknowledgment, to be paid by the grantee 3 00

For serving a writ of possession or restitution 3 00

For holding each inquest or trial of the right

of property, to include all services in the matter except mileage \$3 00

For summoning a trial jury in any civil case 2 00

For traveling, to be computed in all cases from the court-house, to serve any summons and complaint, or any other process by which an action or proceeding is commenced, notice, rule, order, or subpoena, venire, attachment on property, or to levy on execution, or to execute an order of arrest, or order for the delivery of personal property, writ of possession or restitution, to hold inquest or trial of right of property, or in bringing up a prisoner on habeas corpus, for each mile necessarily traveled, in going only, per mile 20

Provided, that if any two or more papers be required to be served in the same suit, at the same time and in the same direction, one mileage only shall be charged; and *provided*, also, in serving a subpoena or venire, when two or more persons or witnesses live in the same direction, traveling fees shall be charged only for the more distant.

For all services in Justices' Courts, the same fees as are allowed to constables.

For keeper's fees for holding personal property under attachment or execution, not exceeding \$3 per day, together with actual expenses necessarily incurred in keeping the same, to be fixed and allowed by the court.

THE FEES OF THE SHERIFFS OF SONOMA AND MARIN COUNTIES ARE AS FOLLOWS:

Serving summons, on each defendant ... \$1 00

Attachment	...	...	...	...	...	\$1 25
Levying execution	...	...	...	...	...	1 25
Executing order of arrest	...	...	...	...	...	1 25
Executing order for delivery of personal property	...	...	...	...	...	1 25
Attachment on ship, boat, or vessel	...	...	...	...	...	1 25
Keeping property, to be allowed by court, not over, per day	...	...	...	...	...	3 00
Taking bond or undertaking	...	...	...	...	...	40
Copies of papers, per folio	...	...	...	...	...	15
Serving every notice, rule, or order	...	...	...	...	...	40
Advertising property for sale, exclusive of printing, each notice	...	...	...	...	...	1 00
Serving writ of possession or restitution	...	...	...	...	...	3 00
Holding trial of right of property, besides mileage	...	...	...	...	...	3 00
Serving subpoena, each witness	...	...	...	...	...	40

Mileage.—For traveling, to be computed in all cases from the court-house, to serve any summons and complaint, or any other process by which an action or proceeding is commenced, notice, rule, order, subpoena, attachment on property, to levy an execution, to post notices of sale, to sell property under execution or other order of sale, to execute an order for the delivery of personal property, writ of possession or restitution, to hold inquest or trial of right of property, or in executing a writ of habeas corpus ; *provided*, that if any two or more papers be required to be served in the same suit, at the same time and in the same direction, one mileage only shall be charged to the most distant points to complete such service ; for each mile necessarily traveled, in going only ... 30

For commissions for receiving and paying over

money on execution, or other process, when lands or personal property has been levied on and sold, on the first \$1000, two per cent.; on all sums above that amount, one per cent.

Commissions as above, without sale, on the first \$1000, one-and-one-half per cent.; and one per cent. on all over that sum.

Commissions are to be collected from the judgment debtor, under the execution, in the same manner as the sum therein directed to be made.

Sheriff's deed, including acknowledgment	\$3	50
Certificates of sale, exclusive of recorder's fee,		
each	...	1 00
Attending court, in person or by deputy, per		
day	...	3 00
Arrest in criminal case, each	...	1 50
Summoning grand jury	...	8 00
Summoning trial jury	...	4 00
Summoning additional jurors, each	...	20
Executing sentence of death	...	20 00

For all civil services in Justices' Courts, the same fees as are allowed in Superior Courts.

For every mile necessarily traveled in executing any warrant of arrest, subpœna, or venire, bringing up a prisoner on habeas corpus, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding; *provided*, that in serving a subpœna or venire, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged, in going only ... 40

For conveying a prisoner, when under arrest, the necessary expenses incurred in the transportation.

IN SISKIYOU, SAN DIEGO, AND MODOC COUNTIES

THE FEES OF SHERIFFS ARE AS FOLLOWS :

Serving summons and complaint	...	...	\$1 00
Attachment	...	...	2 00
Levying execution	...	...	2 00
Executing order of arrest	...	...	2 00
Executing order for delivery of personal prop- erty	...	...	2 00
Attachment on ship, boat, or vessel	...	...	3 00
Keeper's fees to be allowed by court, per day, not over	...	...	3 00
Taking bond or undertaking	...	...	1 00
For copies of writs or other papers, per folio			20
Serving every notice, rule, or order	...	...	1 00
Advertising property, exclusive of printing, each notice	...	...	1 00
Serving writ of possession or restitution	...	...	3 00
Holding trial of right of property, except mileage	...	...	3 00
Serving subpoena, each witness	...	...	50
Mileage in civil cases, per mile	...	...	30
Mileage in criminal cases	...	...	20

Commissions on sale, two per cent. on first \$1000, and one-and-one-half per cent. on all over that amount.

Commissions where no sale, one-and-one-half per cent. on first \$1000, and one per cent. on all over that amount.

Sheriff's deed, including acknowledgment			3 00
Certificates of sale, each	...	...	1 00
Attendance on court, per day	...	...	3 00
Making arrest in criminal case	...	...	2 00
Summoning grand jury	...	...	8 00

Summoning trial jury	...	...	...	\$4 00
Each additional juror	...	...	...	25
Executing every sentence of death	...	...	...	40 00
For all civil services in Justices' Courts, the same fees as are allowed to constables.				

For conveying prisoner under arrest, the necessary expenses incurred in the transportation.

THE FEES OF THE SHERIFF OF THE CITY AND
COUNTY OF SAN FRANCISCO ARE AS FOLLOWS :

Serving summons	...	...	...	...	\$1 00
Mileage, per mile	...	...	...	...	25
Taking bond or undertaking	...	...	...	...	1 00
Certificate of sale, each	...	...	...	...	3 00
Copy of writ or other paper	...	...	...	...	25
Serving subpoena, each witness	...	...	...	...	25
Serving attachment	...	...	...	...	2 00
Levying an execution	...	...	...	...	2 00
Executing order of arrest	...	...	...	...	2 00
Serving order of examination	...	...	...	...	1 00
Serving citation	...	...	...	...	1 00
Serving process in probate proceedings	...	...	...	...	1 00
Serving restraining order or injunction	...	...	...	...	2 00
Advertising property for sale	...	...	...	...	1 00
Sheriff's deed, including acknowledgment	...	...	...	...	5 00
Summoning jury in any case	...	...	...	...	2 00
Summoning grand jury	...	...	...	...	4 00
Attending jury	...	...	...	...	1 00
Attending court in habeas corpus case, each day	...	...	...	...	3 00
Serving writ of possession or restitution	...	...	...	...	3 00
Attending before any officer with a prisoner in surrender of bail, or to receive prisoner	...	...	...	...	2 00
Attachment of any ship, boat, or vessel	...	...	...	...	2 00

Keeping possession of vessel, each day ... \$3 00
 Selling any ship, boat, or vessel, or tackle, or
 furniture, and advertising the same, same fees as
 for sale on execution.

Executing every sentence of death ... 20 00

Keeper's fees, per day ... 3 00

Certificate of redemption ... 5 00

Commissions on executions or decrees—for
 the first \$5000, two per cent.; any amount over
 \$5000, one per cent.

FEES OF CONSTABLES.

The fees of constables in the counties of Alpine, Alameda, Amador, Butte, Calaveras, Del Norte, Fresno, Inyo, Kern, Lake, Lassen, Mariposa, Mendocino, Mono, Merced, Napa, Nevada, Placer, Plumas, San Diego, Shasta, Santa Barbara, Sierra, Solano, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, Sacramento, Ventura and San Mateo, are as follows:

For serving summons, each defendant ... \$0 50

For summoning any jury, including mileage 2 00

Provided, that in the counties of Amador and Butte, he shall have \$2 with mileage.

For making sales of estrays, the same fees as on execution.

For all other services, the same fees as are allowed sheriffs of above named counties for similar services.

In the county of Los Angeles, the constables therein shall receive, in full compensation for all services rendered by them in criminal cases, a sum not to exceed \$300 each per annum, in the aggregate.

In the county of San Joaquin, constables receive the same fees as the sheriff of that county is allowed for like services.

Mileage, going only \$0 30
Except in the county of Inyo, where it is ... 40

The fees of constables of the county of San Bernardino are less by one-third those of the sheriff of that county.

THE FEES OF CONSTABLES IN COLUSA COUNTY
ARE AS FOLLOWS :

For serving summons, for each defendant ... \$0 50
For summoning jury, including mileage ... 2 00
For making sales of estrays, the same fees as on execution.
For all other services, the same fees as are allowed to sheriffs for similar services performed.

CONSTABLES IN THE COUNTIES OF HUMBOLDT, MONTE-
REY, SANTA CLARA, LOS ANGELES, SANTA CRUZ,
SAN BENITO, AND TULARE, RECEIVE
THE FOLLOWING FEES :

For serving summons, each defendant ... \$0 50
Summoning any jury before a justice of the peace, including mileage 2 00
Provided, that in the counties of Amador and Butte he shall have \$2 and mileage.
For making sales of estrays, the same fees as for sales on execution.
For all other services, the same fees as are allowed sheriffs.
For services performed by officers under the

Act concerning water-craft found adrift, and lost money and property, they shall receive the fees prescribed in said Act; *provided*, that in the county of Los Angeles the constables therein shall receive in full compensation for all services in criminal cases a sum not to exceed \$300 per annum; and, *provided*, that in the county of San Joaquin, constables shall receive the same fees as the sheriff of said county is allowed for like services.

THE FEES FOR CONSTABLES IN EL DORADO COUNTY
ARE AS FOLLOWS :

For serving summons, each defendant, including copy	...	...	...	...	\$1 00
Summoning jury of twelve or less	...				1 50
Each additional juror	...	...	...		25
Taking bond	...	...	...	...	50
Summoning witnesses, each	...	...	...		25
Serving an attachment	...	...	...	1	50
Levying an execution	...	...	...	1	50
Summoning and swearing a jury to try the rights of property and taking a verdict	...				2 00

For receiving and taking care of property on execution, order, or attachment, his actual necessary expenses, to be allowed by the justice who issued the order, attachment, or execution, upon the affidavit of the constable that the charges are correct, and that the expenses were necessarily incurred.

Commissions on all sums on execution, three per cent., to be charged against the defendant.

For serving a warrant	1 50
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Serving order for the delivery of personal property \$1 50

Making an arrest in a civil case 1 50

Making each arrest in criminal cases 2 00

For every mile necessarily traveled, in going only, to serve any civil or criminal process or paper, or to take a prisoner before a magistrate or to prison 25

But when two or more persons are served or summoned in the same suit, and at the same time, mileage shall be charged only for the most distant, if they live in the same direction.

For sales of estrays, the same fees as for sales on execution.

For transportation of prisoners to the county jail, the actual necessary expenses.

For attending a Justice's Court and taking charge of a jury, each case 50

For all other services, the same as are allowed sheriffs.

THE FEES OF CONSTABLES OF THE COUNTY OF
CONTRA COSTA ARE AS FOLLOWS :

Serving summons \$0 50

Summoning jury 1 00

Taking bond 25

Summoning each witness 15

Attachment 2 00

Summoning jury and trial of right of property 1 50

For receiving and taking care of property on execution, attachment, or order, his actual necessary expenses, to be allowed, by the justice who issued the execution, upon the affidavit of the con-

stable that such charges are correct and the expenses were necessarily incurred.

Commissions on execution, two per cent.

Serving a warrant or order for the delivery of personal property, or for making an arrest in civil cases \$1 00

Making an arrest in criminal cases 1 00

For every mile necessarily traveled, in going only, to serve any civil or criminal process or paper, or to take a prisoner before a magistrate or to prison 15

But when two or more persons are served or summoned in the same suit, mileage shall be charged only for the most distant, if they live in the same direction.

For making sales of estrays, the same fees as for sales on execution.

For all other services, the same fees as are allowed to sheriffs for similar services.

For services performed by the several officers under the Act concerning water-craft found adrift, and lost money and property, passed April 5th, 1850, they shall receive the fees prescribed in said Act.

IN THE COUNTIES OF SONOMA AND MARIN, THE
FEES OF CONSTABLES ARE AS FOLLOWS:

Serving summons, in civil cases, each defendant \$0 50

Summoning any jury before a justice of the peace, including mileage 2 00

Provided, that in the counties of Amador and Butte, he shall have \$2 and mileage.

Making sales of estrays, the same fees as for sales on execution.

For all other services, the same fees allowed to sheriffs of the same counties for similar services.

For services performed by the several officers under the Act concerning water-craft found adrift, and lost money and property, passed April 5th, 1850, they shall receive the fees as are prescribed in said Act.

THE FEES OF CONSTABLES IN SISKIYOU AND MODOC COUNTIES ARE AS FOLLOWS :

Serving summons, each defendant	...	\$0	50
Summoning jury before justice of peace, including mileage	... ..	2	00

For making sales of estrays, the same fees as for sales on execution.

For all other services, the same fees as are allowed to sheriffs.

For services performed by officers under the Act concerning water-craft found adrift, and lost money and property, passed April 5th, 1850, they shall receive the fees prescribed in said Act.

IN SAN LUIS OBISPO COUNTY CONSTABLES RECEIVE THE FOLLOWING FEES :

Serving summons	... ..	\$1	00
Summoning jury	... ..	1	50
Taking a bond	... ..		50
Attachment	... ..	1	00
Holding trial of right of property	...	2	00

Serving warrant	...	...	...	...	\$1 00
Serving order for delivery of personal prop- erty	...	...	...	...	1 00
Making arrest in civil cases	...	...	...	...	1 00
For receiving and taking care of property on execution, attachment, or other order, his actual necessary expenses, to be allowed by the justice upon affidavit of the constable that such charges are correct and the expenses necessarily incurred.					
Mileage, in all cases, per mile	...	...	...	...	30
Commissions on all sums, two per cent.					
For all other services, civil or criminal, except attending court, the same fees as sheriff.					

THE CONSTABLES OF YUBA COUNTY RECEIVE

THE FOLLOWING FEES:

Serving summons	...	...	...	...	\$0 50
Summoning jury	...	...	...	...	1 00
Taking bond	...	...	...	...	50
Summoning each witness	...	...	...	...	15
Serving attachment	...	...	...	...	1 50
Holding trial of right of property	...	...	...	...	1 50
Serving warrant	...	...	...	...	1 50
Serving order for delivery of personal prop- erty	...	...	...	...	1 50
Making arrest in civil cases	...	...	...	...	1 50
Arrest in criminal cases	...	...	...	...	1 50
Mileage in all cases, per mile	...	...	...	...	20
Making sales of estrays, the same fees as for sales on execution.					

Commissions on execution, two per cent.

For receiving and taking care of property on
execution, attachment, or order, his actual neces-

sary expenses, to be allowed by the justice who issued the execution, upon the affidavit of the constable that such charges are correct, and the expenses were necessarily incurred.

For all other services, the same fees as are allowed to sheriffs for similar services.

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APPENDIX NOTE TO CHAPTER III, ON CLAIM AND DELIVERY.

When personal property, which has been levied upon by the sheriff, has been taken from him in replevin, by the party claiming it, he should consult his own safety and proceed no further in the matter, but rest securely on the bond given by the plaintiff in the replevin suit. He may, under § 514, C. C. P., give an undertaking and retake the property; but if he pursue this course, he and his sureties will be liable to the claimant for its value. Having subsequently sold the property under the execution, and paid the proceeds to the plaintiff in execution, he may eventually be compelled to pay its value to the claimant.

ERRATA.

Read “praying” for “paying” in the eighteenth line on page 298.

Add “a copy of said summons” after the figures “18—” in Form No. 4, on page 425.

Insert date of service after the word “defendant,” in Form No. 8, on page 427.

Read without the word “no” in the sixth line on page 291.

APPEND
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